VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., ET AL., PETITIONERS,

vs.

WINCKLER & SMITH
CITRUS PRODUCTS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 20, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

No. 15242

United States
Court of Appeals
for the Ninth Circuit

SUNKIST GROWERS, INC., a Corporation and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation,

Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation and RONALD WALKER, Trustee,

Appellees.

Transcript of Record
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Volume II
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Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-11-57

December 13, 1955—2 P.M.

Ladies and gentlemen, we will now have the plaintiff's opening statement.

An opening statement is not evidence, it is not argument, it is merely the plaintiff's way of explaining to you the outline of its case. It is not evidence in the case.

You may proceed, Mr. Dixon.

Mr. Dixon: May it please the court, ladies and gentlemen of the jury. It now becomes my privilege to tell you what this case is all about insofar as the plaintiff is concerned.

As the court has indicated, what I will say to you is not evidence, but is merely for the purpose of telling you what the plaintiff expects the evidence will prove, so that you may better understand the case and be better able to pass upon the evidence as it may come before you during the trial.

Now, as his Honor has indicated, this case involves what is known as the Sherman Antitrust Law and the Robinson-Patman [118] Act.

His Honor will of course instruct you concerning that Act at the proper time during the trial of this case. Suffice for me to say at this time that the action that the plaintiff has brought, and concerning which you are going to pass upon the evidence, involves Sections 1 and 2 of the Sherman Antitrust Law, and the so-called Robinson-Patman Act.

Now, Sections 1 and 2 of the Sherman Act or the Sherman Law, Antitrust Law, provides that combinations or conspiracies for the purpose of restraining trade or commerce, that is, interstate trade or commerce, and contracts which have that effect, or

combinations, or conspiracies, which may be entered into between parties—and there must be more than one party to have a conspiracy—for the purpose of monopolizing any part of the trade and commerce of the United States, or any attempt to monopolize any part of the trade and commerce of the United States, is made illegal. [119]

The Robinson-Patman Act that his Honor has referred to deals primarily with what we refer to as discriminatory trade practices, that is to say, the selling of the same product to different purchasers at different prices would be an example of that type of act, and it is with that type of practice that we expect the evidence will deal in this case.

Now, the commerce that is involved here is the citrus juice industry insofar as it relates to citrus juices that are processed in California and are sold in intrastate and interstate commerce. In other words, the citrus juices that are processed in California and sold throughout the rest of the country are part of the trade and commerce in citrus juices.

The industry involved here, of course, relates to the oranges, the grapefruit and the lemons that are processed into citrus juices in California. In other words, you all know that there is, of course, a substantial amount of oranges and lemons and grapefruit that are grown, not only in California, but in Arizona, our adjoining state. A very great part of that, as a matter of act, a substantial part of that type of citrus fruit is sold as fresh citrus fruit. In other words, we are not concerned with that kind of citrus fruit because it does not go into the citrus

juice products, but about less than a third of the total product of oranges, lemons and grapefruit that are not sold as fresh citrus fruit [120] in commerce are processed into citrus fruit juices here in California, and also in Arizona, where they are grown.

The fruit that goes into citrus juices is known as product fruit. In other words, it is better described because certain products result from the processing of those citrus, such as lemons, oranges and grapefruit, into citrus product. Generally speaking, those products may be classified into three different types of groups.

The first may be referred to as single-strength juice product. In other words, product oranges are subjected to a processing arrangement, and the result is what is called a single-strength orange juice product. That product is canned and sold as single-strength orange juice. In California, it is processed here and the canned single-strength juice is sold throughout the rest of the country as well as in California.

Then there is a second type of product which is called a concentrated juice product, and that is the product which is canned and to which water is added after you buy it at the store and you have a product that is comparable to regular orange juice.

The third type of product is what is known as the frozen citrus juice product, and there is a variety of products there. You have frozen orange juice, frozen lemon juice, and you may have many types of products there, but the [121] frozen single juice product is relatively new, as many of you house-

wives on the jury may know. In other words, it has come into the market as a food product within the last five years, and was not known really as far as consumption is concerned on a national scale prior to that period of time. [122]

So that the product and the commerce that we are going to deal with in this case is citrus juices, and we are going to deal with primarily single-strength Valencia orange juice.

Now, I say "primarily," because as you know there are two types of oranges. There are navel oranges and there are Valencia oranges. The navel oranges do not make a particularly good single-strength juice, because it isn't as sweet as the Valencia oranges. Therefore the single-strength juice comes primarily from the Valencia orange. And about 50 per cent of all of the Valencias that are grown in the United States are grown here in the State of California.

As I suggested a little while ago, most of those are sold as fresh oranges in the various markets of the country, and the balance that isn't is sold to independent processors by the grower or the supplier, or it may be processed by the grower himself, or itself into various products and sold in commerce.

Now, that is the kind of commerce that we are going to deal with in this case.

Before I proceed further I want to say a word about the parties to this lawsuit. The plaintiff, first.

The plaintiff is what is known as an independent processor. At least I am going to call him that, or it

that, in the trial of this case. By independent processor I mean that the plaintiff did not have any access to the raw fruit [123] that it was necessary for it to have in order for it to process that fruit into the various types of citrus juices that I have referred to. It, therefore, had to go out in the market and buy this fruit from a supplier. And that was its principal source of supply.

Now, the plaintiff was organized back in 1945. I am not going to go through its history with you. In 1948, it did have some financial difficulties and went through reorganization proceedings under Paragraph 11 of the Bankruptcy Act. In 1949, it was operating at a full scale of operations. Its sales in that year in citrus juice products were in excess of $1,000,000. It had a profit of over $120,000 in that year of operation.

In 1950, it also operated at a profit, although the profits that year were not as large as they were in 1950.

In 1951, we had a situation that I will go into at length in a moment. I just wanted you to know what the business was that the plaintiff was engaged in, and it did process citrus juices, including some frozen juice products, as well as concentrated and single-strength juices here at its plant in Anaheim, California, and those products were sold in California and in the various other states of the United States.

The defendants involved in this case are what is now called the Sunkist Corporation, I believe it is. It used to be known as the California Fruit Growers

Exchange. That is [124] the first defendant in this lawsuit, that is one of the two defendants in this lawsuit, and that corporation was organized back in 1905, I believe it was, and is an association of growers of oranges and citrus juice products. It is really a marketing organization for the growers. And in connection with the marketing of the products which the growers, its members, raised, it of course sold the fresh oranges that its members grew, and the grapefruit, and the lemons, in interstate commerce in the fresh fruit market. [125]

But there again there was a substantial part of the products, by that I mean about 18 or 20 per cent, shall we say, of the product that went into this product fruit market, that is to say, that part of the oranges and grapefruit and lemons that were not sold as fresh fruit were processed into these various kinds of citrus juices and were sold in the various states of the United States in interstate commerce.

Now, the other defendant in this case, Exchange Orange Products, that is a separate corporation that was formed during the 1940's, I believe it was, but that corporation is a wholly-owned subsidiary of Sunkist and deals primarily, almost entirely, with product fruit. That is to say, it sells the product oranges and other citrus products that are not processed by Exchange Orange itself to independent processors. The products, therefore, which is makes, namely citrus juices of single strength, Valencia oranges, for example, are in direct competition with the products of these independent processors, such as the plaintiff in this case. That is to say, the plain-

tiff corporation, dependent upon the product fruit as a source of its means of processing citrus juices which it sold and the juices which it processed from the citrus products, were in competition with those which were processed by Exchange Orange Products Company, the 100 per cent subsidiary of the Sunkist defendant in this [126] case.

There are some other companies involved here, namely, the TreeSweet Products Company, the TreeSweet Orange Products Company, and Silzle Corporation—we will refer to them as TreeSweet and Silzle during the trial of this case—who were also independent processors of citrus juices, but they only processed single-strength juices, that is primarily Valencia orange juice. I will deal with some of the arrangements that were made between TreeSweet and Silzle and Exchange Orange Products Company in a moment.

At this time I merely want to say that the evidence will show that they were producing products that were also in competition, not only with the products of Exchange Orange, but also the products which the plaintiff corporation made, primarily single-strength Valencia orange juice.

Now, that is the situation with reference to the plaintiff and the defendants in this lawsuit.

I should add further, perhaps, that the evidence will show that the defendant Sunkist markets all of the juice products that are produced by its subsidiary, as it does all of the fresh fruit products grown by its members.

Now, there is another company that will come into

this case known as Exchange Lemon Products Company. That is a separate corporation. It is in some respects comparable to the defendant Sunkist because, while it is primarily an association [127] of growers of lemons, and the lemon company and the orange company have a joint arrangement between themselves whereby, as I said, the lemons that are grown by the lemon company are sold by Sunkist and some of the lemon citrus juice products that are made from the lemon by-product fruit is not only processed from time to time by Exchange Orange, the other defendant in this case, but they are the marketing agent. In other words, Sunkist is the joint marketing agent for all of the oranges and the lemons that are grown by the members of Sunkist and the members of Exchange Lemon Products.

Now, we expect the evidence will show in this case that the defendant Sunkist, that is the members of that defendant association, produced in excess of two-thirds of all of the oranges grown in the state of California.

That Exchange Lemon Corporation that I have just referred to produced in excess of 86 or 87 per cent of all of the lemons that are grown in California, and I might say here that California accounts for almost 99 per cent plus of all of the lemons that are grown in the United States.

So that that is the position of these two companies, Sunkist and Exchange Lemon, with reference to the availability or the volume of oranges and lemons that are grown in this area.

The members of Sunkist also produce about 50 per cent of all the grapefruit that are grown. I might say grapefruit [128] isn't too important a product in this case, and it is used primarily for making grapefruit juice and sometimes for blending purposes, perhaps, but the primary product that we are concerned with here is Valencia oranges, and we will deal with that primarily during the course of this case.

Now, as I have suggested, the defendant Sunkist controlled about two-thirds of all of the oranges produced in the area, and it therefore, to a very great extent, set or determined the price at which process oranges would be sold to independent processors. That is something I will deal with in a moment.

Suffice to say at this time that in the year 1951, which we are going to deal with particularly, the price list put out to independent processors, including this plaintiff as a potential buyer of product oranges, remained stable during the year 1951. In other words, there was just the one price list that was put out by the defendant Sunkist or Exchange Orange Products during the year 1951.

The evidence will show, then, that the plaintiff to a very great extent was dependent directly or indirectly upon the amount of oranges, that is Valencia oranges, product oranges, that were available in the market for processing into single-strength juice, primarily from, first, the defendant Sunkist.

Now, the defendant Sunkist did not furnish many [129] oranges, at least the plaintiff corpora-

tion did not buy many oranges from the defendant Sunkist after 1949, although it had purchased many tons of fruit from it prior to that time, and it secured most of its product oranges from other sources, but the price at which those oranges were available, whether they were acquired from Sunkist or whether they were acquired from such independent producers as make them available to independent processors, the price was substantially the same, no matter where they were acquired.

Now, I suggested to you, and the evidence will show that the plaintiff corporation here had developed a substantial interstate market for its citrus juice products. The evidence will show that in 1949 its markets, that is, its total sales, were in excess of $1,000,000, as they were in 1950, citrus juice products.

The evidence will also show that in the year 1949 about 80 per cent or more of the product, that is the single-strength product, which it made, was sold in interstate commerce. [130]

In 1950, about 75 per cent, and in 1951, its products in the single-strength orange juice market went down to about 55 or 60 per cent, practically all of which was purchased by the plaintiff in Florida. In other words, in 1951, the single-strength market, into which the plaintiff sold its products, were interstate in character, as they were in the years 1949 and '50, but it was unable to produce, the evidence will show, any single-strength Valencia orange juice, which was its principal product, and its principal source of income and profit, during the year 1951.

The total sales of the plaintiff in 1951, were slightly in excess of a half million dollars. In other words, there was a substantial dropoff in the volume of its production, and the volume of its sales in single-strength citrus juice products in 1951.

I have mentioned TreeSweet, this other corporation, and Silzle, to you as being independent processors of single-strength citrus juice, that is orange juice. We expect the evidence will show that in 1951, the defendant Sunkist during that year had substantially, again, more than two-thirds of all the Valencia product oranges that were available in California for processing into single-strength juice.

We expect the evidence will show that during that year the price at which the defendant Exchange Orange Products, that is, this other defendant, and a 100 per cent subsidiary [131] of Sunkist, sold such Valencia oranges to independent processors, and that price remained the same throughout the canning or processing season.

Now, the price of oranges, Valencia product oranges, is determined on the basis of what is known as solids or soluble content.

We expect the evidence will show, for example, that if a processor paid $40 for a ton of Valencia oranges, regardless from what source it was able to get those oranges, that if he paid $40 for that ton, that that ton was supposed to have, say, 120 pounds of soluble content.

I don't want to be technical, and we will explain that during the course of the trial. Suffice to say that the average ton of oranges, Valencia oranges, would

produce about 100 gallons of single-strength juice. For that, shall we say, you would pay an average price of $40 a ton.

Now, if you were buying that, that is, the evidence will show if the plaintiff bought a ton of oranges and paid $40 a ton for it, and it was based on 120 pounds of soluble content, that that would produce on an average about 100 gallons of single-strength juice.

We expect the evidence will also show that the cost of producing or processing that ton of oranges into 100 gallons of single-strength juice would be about $35 a ton. In other words, there would be the processing cost for turning the [132] 100 tons of Valencia oranges into single-strength juice.

We expect the evidence will show that the average-sized can of single-strength oranges—there are several sizes, but the one that was principally sold was what is known as the 12-46, that is a dozen of 46 ounce cans of single-strength orange juice to a case; that a case of 12 46's would have, say, four gallons and three-tenths of single-strength juice in that case.

So, you see, by converting the cost of the oranges to the processor, and the manufacturing cost of processing that into single-strength juice, you would get $40 plus $35, which would be about $75 a ton. And to use round figures, if you got 100 gallons of juice out of a ton that would be about 40 cents a gallon, or a case. It would be about 40 cents a gallon.

Now, we expect the evidence will show that while the price of oranges that were available for proces-

sing into single-strength juice in 1951 was stable, that is, there was just the single price all during the canning season, that the so-called opening price for single-strength orange juice in 1951, as indicated by the price lists of the defendant Sunkist, was around about $2.20 a case.

We expect the evidence will show, therefore, that with the price of oranges remaining stable, as they did, and the opening price of Sunkist, which was the competition which [133] any processor of single-strength orange juice would have to meet, was this price of $2.20 a case, that no independent processor could purchase oranges at the going price of $40 a ton, process them into single-strength juice, put them in a case of 12 46's, and sell them for under $3.20 a case. In other words, the independent processors, such as the plaintiff in this case, were really —the orange squeeze was really on in 1951, so that it was impossible for the plaintiff corporation at that time to process any single-strength orange juice in California, because of the price of oranges, and because of the fact that it would cost the plaintiff in the neighborhood of $1 more per ton—I mean per case—to produce and sell a case of single-strength orange juice in competition with that which was processed and sold by Sunkist.

Now, we expect the evidence will show, further, that being obviously aware of that fact, it was just a matter of mathematical computation, the defendant Exchange Orange Products, a 100 per cent subsidiary of Sunkist, entered into a contract with

TreeSweet, which was in competition with Sunkist and with this plaintiff; that TreeSweet processed and sold only single-strength Valencia orange juice; that in 1951, the time that I have mentioned and just referred to, that Exchange Orange Products gave and entered into a contract with TreeSweet, its competitor, pursuant to which it made Valencia oranges available to TreeSweet under circumstances whereby the oranges were acquired on a consignment basis. In other words, TreeSweet did not pay for the oranges as they were delivered, they did not have to put up any cash for them when they were delivered; that the contract called for TreeSweet to process those oranges which were delivered to it by Sunkist into single-strength juice, and the contract provided that TreeSweet would be paid the entire processing costs incurred by it in processing those oranges into single-strength juice, and also be guaranteed or have a profit on that operation, and then TreeSweet under this contract purchased all of the juice which it processed under this contract from Sunkist at the Sunkist selling price, say $2.20 a case, less certain discounts, namely an advertising discount, and an allowance of so much a case, a label allowance of so much a case, and in addition thereto it was given a 15 per cent further discount from the total selling price of the case of single-strength orange juice. [135]

So that what actually happened, and we expect the evidence will show, is that under this arrangement a competitor of this plaintiff was able to secure oranges from the defendant Exchange Orange Products Company on this basis. It did

not have to pay for the oranges. It did not have to pay for the products it processed, except as it sold those products in commerce, and then it remitted to Sunkist for the juice that it had sold on the basis of the Sunkist selling price, less these various discounts and allowances I have mentioned.

Now, we expect the evidence will further show that at the same time during 1951 the defendant Exchange Orange Products entered into another contract with Silzle which was substantially of the same type and character. I will not go into it at this time.

The evidence will show that the effect of both of these contracts was that TreeSweet, a competitor of this plaintiff, was able to in fact secure oranges at a cost, if you want to transfer the product I have mentioned back into tons of oranges, at a cost to it of about $12 to $14 a ton as against a price of $40 a ton which the plaintiff would have had to pay no matter from what source it secured the product.

And the same was true with reference to the availability of oranges to the competitor Silzle. [136]

We expect the evidence will show that TreeSweet and Silzle under this contract sold the product that they processed, not under a Sunkist label, none of this juice that was processed was processed and sold under the Sunkist label at all, or under the Exchange label, which was the other label used by the defendant Sunkist, but was sold under the TreeSweet label and the Silzle label.

Now, we expect the evidence will further show

that as a result of this kind of a deal, or the making of Valencia oranges available to the competitors of this plaintiff under the contracts that I have mentioned, TreeSweet was able and in fact made a net profit per ton of around $6.00 a ton on every ton that it processed under this contract, and there was about 24,000 tons as to TreeSweet. The net profit per ton to Silzle was a little less, and the amount that they produced was considerably less. Silzle only processed about 7,000 tons under this contract.

But the profit which they made not only was the amount I have suggested on each ton that they were able to process under this arrangement, but the important thing was that the provisions of these contracts between TreeSweet and Silzle and Exchange Orange provided that TreeSweet and Silzle would be paid the processing cost incurred by them according to a stipulated amount, namely, approximately, shall we say this $35 a ton figure I mentioned to you a few minutes ago. [137]

Now, we expect the evidence to show that that was of vital importance to the companies processing single-strength juice during this period under these contracts, because the overhead of any independent processor, of course, depends upon the extent to which it can keep its plant processing fruit during the processing season, and this plaintiff corporation, we expect the evidence will show, had made plans for expanding its operations, particularly into the frozen field, that is the frozen citrus juice product, in 1951, and was preparing to do so during that year, but that its primary source

of profit and the item upon which it depended for its operation was the processing of single-strength Valencia orange juice that I have mentioned.

So that the competitors of this plaintiff, who were also competitors of Sunkist, selling the same product, the single-strength orange juice, had the advantage of this kind of a contract that we expect the evidence will show had this effect. As a result of this arrangement the plaintiff corporation produced practically no single-strength juice in 1951. It had theretofore built up a substantial amount for it, insofar as this plaintiff corporation was concerned, for that produced.

It was thus eliminated in effect from the single-strength interstate juice market in 1951, while its competitors under the arrangements that they had with Sunkist [138] and Exchange Orange Products, were able to and did in fact expand their market, keep the market that they had, and in effect the single-strength juice market, insofar as California single-strength juice, Valencia juice, is concerned, and in 1951 it had entirely, substantially 100 per cent, gone to the defendants Exchange Orange Products, TreeSweet and Silzle, to the exclusion of any other competitors for that kind of a product.

We expect the evidence will further show that in 1950 the defendant Sunkist had decided to embark upon an extensive advertising program for the Sunkist label products. In that year, namely, 1950, it had purchased the right to the Sunkist name and had paid therefor a million and a quarter dollars.

It had also set up a budget, advertising budget, to promote and develop the Sunkist name and the Sunkist products, particularly in the frozen juice market, in which the plaintiff corporation was then embarking.

The evidence will show that there was in fact, according to our sales reports, a scarcity of this so-called California Valencia juice in 1951. They had to withdraw from the market once or twice during the season. This plaintiff, of course, was out of the market in its entirety.

We expect the evidence will further show that following the reorganization of this plaintiff in 1948, early part of 1949, during the years 1949 and 1950, it had [139] expended in excess of $100,000 in new equipment in its plant, that it had made arrangements in 1950 and it had secured the approval of the California Corporation Commission to issue some additional stock for further operating capital to take care of the expanding operations of this company.

The evidence will further show that the plaintiff corporation undersold the Sunkist product and the TreeSweet product insofar as the price at which its single-strength Valencia juice was sold in commerce.

As a result of all this, we come to the question of damages. It isn't going to be an easy question for you to decide, but under the proper instructions of his Honor you will have ample guides to show you how to arrive at any damages that you

may determine the plaintiff has suffered as a result of any of the violations charged by the plaintiff in this case. But before I discuss the damage question or tell you what we expect the evidence will show with reference to damages, I think I should deal with this problem about damages by stating to you what and how and why we expect damages in this case.

It is the theory of the plaintiff in this case that the defendants Sunkist and Exchange Orange Products combined together with Exchange Lemon Products, TreeSweet and Silzle to restrain interstate trade and commerce in citrus juice products, particularly single-strength Valencia juice [140] products processed in California and sold in interstate commerce, and that the parties and corporations I have mentioned combined together for the purpose of monopolizing the citrus juice market as represented by that part of the market which comes from the citrus juices that are processed in California and sold in interstate commerce; and that their conduct in this case constituted an attempt to monopolize that market and that it had that effect.

In other words, we expect the evidence will show that as a result of these agreements that I have mentioned the defendant Exchange Orange Products, TreeSweet and Silzle processed substantially all the single-strength juice that was processed in California in 1951 and sold in interstate commerce, and that the conduct of the defendants in this case constituted, if you find that they had monopoly control over the availability of the raw product

here, namely, the product oranges, that an independent processor had to have to process and sell citrus juices in interstate commerce, that their conduct constituted an abuse of that monopoly power and an unreasonable restraint of trade, and that these contracts in fact in which the products which were processed by TreeSweet, Silzle and Exchange Orange Products, all of which were supposedly in competition with each other and also in competition with this plaintiff, were sold at the same price, namely, at Sunkist prices. [141]

That the effect of that was to eliminate the competition of this plaintiff on an interstate market for citrus juice products in violation of the law.

Now, we expect the evidence will further show with reference to the Robinson-Patman Act—withdraw that.

We expect the evidence will further show that the plaintiff corporation in 1951, when the processing season for Valencias got under way, and that is about the middle of June, 1951, could not understand how its competitors, TreeSweet and Silzle, were able to process single-strength juice and to sell it in interstate markets, for the reasons that I have mentioned, that is to say, the price at which oranges were available for processing being $40 a ton, the manufacturing cost $35 a ton, that the actual costs of processing a ton of oranges into juice would be in excess of the selling price for that product. They felt that there must be something there, so its plant being practically idle, its facilities being unusable, because it couldn't obviously buy oranges at $40 a

ton and pay $35 for processing them, and then sell them at a loss. They just didn't produce any. They contacted Exchange Orange Products and said, "We have facilities available for processing oranges, would you be interested in processing your products in our plant under any arrangement that is acceptable to you?"

A letter was written to the same effect, making the same [141] request, not only of Exchange Orange Products Company, but also of Exchange Lemon Products Company.

We expect that the evidence will show that Tree-Sweet had an arrangement or there was an arrangement between Exchange Lemon Products and Tree-Sweet whereby lemons were made available to it under an arrangement. It wasn't the same kind of arrangement, but it was an arrangement where they were processed, and then they bought the juice from Exchange Lemon Products. But that in spite of the requests of the plaintiff corporation to make its facilities available for processing to Sunkist and Exchange Lemon Products, they were not taken advantage of, and it was turned down.

Now, his Honor will charge you, I am certain, with reference to any obligation of anyone to sell to someone else. I am not going to go into that at this time.

It is the contention of the plaintiff in this case that all of these facts, which we expect the evidence to show to be the facts, clearly indicated that the defendants had combined together for the purposes that I have mentioned, in restraint of interstate trade and commerce.

As further evidence of that we expect the evidence will show that in the Silzle contract it appears right on the face of the contract that oranges were made available to Silzle, over 500 tons of them, at a price of $20 per ton, and on the price list which we will submit to you as being [142] the price list of the defendant Sunkist, there isn't any $20 fruit on that price list.

Furthermore, we expect the evidence to show that as the plaintiff lost its customers in single-strength juice, that it made a request of the defendant Exchange Orange, when it was losing its business, that it sell a carload of single-strength orange juice. That the defendant did so, but that the price at which that carload of orange juice was sold to this plaintiff was the Sunkist selling price, less only a brokerage discount, which is given ordinarily to any purchaser under those circumstances where the seller did not have to pay a brokerage, and that was the extent of the discount made available to this plaintiff on that sale.

But that at the same time under the contract that I have mentioned the defendant was allegedly selling single-strength juice to the competitor of this plaintiff at a price which not only gave it an advertising allowance—and they were not advertising any Sunkist brand when they were selling their own brand, the evidence will show—but in addition to that there were other discounts that were made available to TreeSweet and Silzle that were not available to this plaintiff who was trying its best to keep a market for its product. That it spent $40,000, a small amount

compared to the mililons spent by Sunkist, in developing an advertising program for its label, but nevertheless to this corporation an advertising [143] cost, in an effort to keep that market. That this plaintiff did not get the 15 per cent discount after all these other discounts that were made available to TreeSweet when it bought the juice that it processed from the oranges made available to it by Sunkist, and neither did it get the 12½ per cent discount that was made available to Silzle when Silzle bought the oranges—I mean paid for the juice that it processed under this arrangement.

The evidence will further show discriminations of that character. That TreeSweet and Silzle didn't have to pay, even, for the orange juice, until they had sold it in commerce to their customers.

Now, we expect the evidence will support these charges, therefore that they add up to a combination to restrain trade and commerce in citrus juice products; that they add up to a combination to monopolize that part of the trade and commerce which is represented by the citrus juices that are processed in California and sold in commerce. That as a result of these discriminatory contracts and arrangements the plaintiff was eliminated as a factor and lost its business in 1951, when it was on the threshhold of developing and expanding its market for frozen citrus juices, which brings us back to what we expect the evidence will show on damages.

We expect the evidence there will show that during the years 1949 and '50 the plaintiff corporation's sales were in [144] excess, as I may have mentioned

before, of $1,000,000; that during 1949 its profit was in excess of $120,000; that in 1950 it was approximately $40,000.

There are two guides, or guides which we expect the evidence will show, you may use under proper instructions from his Honor on the item of damages to this plaintiff.

In addition to that we expect, and it is the position of the plaintiff, the theory of the plaintiff on damages here, that it was entitled as an independent processor, in view of the monopolistic position of the defendant Sunkist in this industry, whereby the price was determined for the product fruit, and to some extent the availability of that fruit was determined by that position, that the plaintiff was entitled to at least comparable consideration to that given its competitors TreeSweet and Silzle.

That based upon that consideration we expect the evidence will show that in 1950 this plaintiff when it had a profit of $120,000 processed in excess of 12,000 tons of oranges; that that, therefore, is some guide as to the extent of the loss of profits by reason of the alleged violation in this case, but that the important loss here, and the 1951 operating reports of the plaintiff corporation, we submit, will show a loss of around about $170,000. That a substantial part of that loss is attributable to overhead of the plaintiff corporation. That is to say, there is always in the operation of [145] any business an item known as overhead, which goes on whether one case or 50 cases or 5,000 or 500,000 cases are processed. That that item was taken care of for Silzle and TreeSweet

when they were paid the processing costs in their contract.

The contracts will show, as I suggested, and the evidence will show, that that was a profit given to TreeSweet and Silzle which covered that important item of operating costs, namely overhead, in their contracts.

So that it will be for you to determine under all the evidence whether this plaintiff was discriminated against by reason of these acts, and whether such discrimination constituted a violation of the antitrust laws, and if so, as to whether or not this plaintiff was entitled to comparable treatment, and so request of the defendant, to at least the extent given its competitors.

And if you reach that position, then the figures on the profit available per ton, plus overhead, will be available to you as a yardstick to determine the loss or the damages which may be returned by you in a verdict for the plaintiff in this case.

We, therefore, submit that the evidence in this case will show a violation of the antitrust laws, Sections 1 and 2 of the Sherman Act, and of the Robinson-Patman Act, and that the plaintiff suffered damage of substantial nature by reason of being eliminated from this market. And in 1952 [146] it had an RFC loan on its property, which was being called, of $50,000; that it had reduced in 1950 the balance then due on that mortgage from $100,000 to $50,000; that it was required by reason of that action to go into Federal Court, this court, and to file under what is known as Chapter 10 of the Bankruptcy Act,

which permits the reorganization of the affairs of this corporation.

It was pursuant to that action that Mr. Walker, the trustee here, was appointed by this court to take over the affairs of this company.

We expect the evidence will show that there being no market for this type of product, I mean of plant, that it was ultimately forced to dispose of it, the trustee was forced to dispose of it for the sum of $100, subject to the prior lien and claim of the RFC, and such other claims as might have been made against it by the creditors of the plaintiff corporation.

That, ladies and gentlemen of the jury, is the evidence that we submit will be developed and presented by the plaintiff.

I appreciate your careful consideration, and that you have borne with me while I have tried in a general way to outline to you and to simplify for you what may perhaps seem rather a complicated and involved lawsuit, but we think when the evidence is all in and you consider it, you will find [147] that there has been a violation here of the antitrust laws by the defendant, and that plaintiff has been damaged as a result of that violation.

Thank you very much.

The Court: Do the defendants care to make an opening statement at this time or reserve it until the conclusion of their case? If so we will have a recess first.

Mr. Williams: Your Honor, we have certain motions that we would like to make first.

The Court: Well, do you or do you not intend to make an opening statement?

Mr. Hurd: If the court please, it depends somewhat upon the outcome of the motions to which Mr. Williams refers, but we probably will make it in the event the outcome is one way——

The Court: All right. We will take a recess, then, ladies and gentlemen of the jury.

You have heard no evidence whatsoever, so there is no way you can make up your mind about anything. Remember what I told you before, my admonition to you, do not discuss this case among yourselves or with anyone else, do not permit anyone to discuss it with you, do not form or express any opinion on the merits of the case until it is finally submitted to you for your decision.

You will be excused for a short recess. [148]

(The following proceedings were had in the absence of the jury:)

The Court: The record will show the jury is now absent. Do you want to make the motions before or after the recess?

Mr. Williams: Whichever your Honor prefers.

The Court: I think we will take our recess and then hear your motions before the jury are brought down.

Mr. Williams: All right.

(Recess.)

The Court: The record will show counsel present and the jury absent in the case. Mr. Williams?

Mr. Williams: May it please the court, the defendants object to taking of any evidence in this case and move to dismiss the action upon two grounds.

First, that plaintiff's opening statement has failed to state any claim upon which relief can be granted and, secondly, that the amended complaint fails to state a claim upon which relief can be granted.

As to the motion with respect to the amended complaint, as to the first cause of action, the grounds of said motion are as follows:

It is couched in the words of the statute and does not set forth the terms of any conspiracy, combination or contract in unreasonable restraint of interstate trade or commerce. [149]

Second, it fails to plead any facts showing or otherwise to allege any conspiracy, combination or contract tending to prejudice the public interest.

Third, it fails to plead any facts showing or to otherwise allege that any legal right of the plaintiff was invaded by the alleged refusal of Exchange Orange to enter into a custom packing agreement with plaintiff for processing oranges during the 1951 canning season comparable to the contracts entered into with defendant TreeSweet and the alleged co-conspirator Silzle.

Fourth, it fails to plead any facts showing or otherwise to allege that the claimed contract, conspiracy and combination had any substantial effect upon interstate commerce.

As to the second cause of action, the grounds of said motion with respect to the complaint are as follows:

One, it fails to state a cause of action separate and distinct from the first cause of action.

Second, that it is couched in the words of the statute and does not set forth facts showing terms of any conspiracy to monopolize, any monopoly, or any attempt to monopolize.

Third, it fails to plead any fact showing or otherwise to allege any tendency to prejudice the public interest.

Fourth, we rely upon the same grounds as [150] those stated as to the first cause of action.

As to the third cause of action, the grounds of said motion with respect to the amended complaint are as follows:

First, it is couched in the language of the statute and does not set forth facts showing discrimination in price, allowances, services, and facilities, either lawful or unlawful.

Second, it does not appear from the amended complaint that any supposed discrimination of any kind against the plaintiff was in the course of interstate commerce.

With respect to our motion based on the opening statement of the plaintiff, it is based as to the first cause of action upon these grounds.

First, it fails to state any fact showing any conspiracy, combination or contract in unreasonable restraint of interstate trade or commerce.

Second, it failed to state any fact showing any conspiracy, combination or contract tending to prejudice the public interest.

Third, it failed to show any legal right of the plaintiff was invaded by the alleged refusal of EOP to enter into contracts comparable to that entered into with TreeSweet and Silzle during 1951.

Fourth, the statement failed to show any facts showing [151] that the contracts, combinations or conspiracies had any substantial effect upon interstate commerce.

And as to the second cause of action, our motion is based upon the ground that there were no facts showing any alleged unlawful monopoly, any unlawful intent to monopolize, or any unlawful conspiracy to monopolize.

And upon the further ground that the statement did not show any tendency to prejudice the public interest.

Also, as to the second cause of action, the motion is based upon the ground that the statement did not show any legal right of the plaintiff was invaded by any act of a defendant or any act of the defendants.

As to the third cause of action, our motion with respect to the opening statement is based upon the ground that no discriminations in price, allowances, services and facilities were stated and upon the additional ground that the statement did not show that any of the supposed discriminations with respect to prices, allowances, services or facilities occurred in the course of interstate commerce.

The Court: All right. Both motions are denied on all grounds.

I take it this is largely a motion made to preserve your record, and I don't think it needs a lot of com-

ment on my part except to say this. The original complaint filed in this action alleged that the defendants contracted [152] to eliminate the plaintiff. The defendants are not surprised. They have known for a long time what contracts the plaintiff was talking about. This isn't a case of an amended complaint going off on some ground that was not indicated in the original complaint. Through discovery the Silzle contract turned up and the general allegation we began with, that the defendants had contracted and conspired, seems to be entirely proper and the Silzle contract to be part of the amended complaint, and that the amended complaint dates back to the original complaint in connection with the Silzle contract.

Public interest, I have commented on that before. It is not the allegation of public interest that is important. It is the showing of sufficient facts and sufficient allegations to show an effect on the public interest. The Supreme Court in the plasterers case expressly referred to conclusionary allegations in the matter of pleadings, and sufficiency of pleadings is largely within the trial court's discretion.

This is not a case where you have any problem about knowing what you are charged with. I don't think any one of the defense counsel could stand on his feet and tell me that you are being charged with something which you don't know you are being charged with. You know what you are being charged with and have known it for a long time, and the manner of expressing those charges, the sufficiency of the pleadings is, as I say, a matter within the trial court's discretion. [153]

It is not a situation where you are taken by surprise and it is not a situation where you can't tell what the charge is. It doesn't come within any of those exceptions.

I don't think any further comment is necessary. We have been over most of these problems before.

The motions are denied.

Mr. Hurd: The defense will make an opening statement at this time, may it please the court.

The Court: Bring the jury down, Mr. Bailiff.

(The jury returned to the courtroom at 3:20 o'clock p.m.)

The Court: The record will show the jury and the alternates in their proper places. Mr. Hurd?

OPENING STATEMENT ON BEHALF OF THE DEFENDANTS

Mr. Hurd: May it please the court, ladies and gentlemen of the jury: First, I would like to apologize to the court and to the jury for the condition of my voice. I hope you will not be too irritated by it. Let me assure you I do not have a cold, so you needn't worry about catching any germs. I just rode in the wrong taxicab at the right time, or rode in the right taxicab at the wrong time, and ended up with my face here instead of where it should have been. I hope I will be able to continue with you throughout the trial and [154] I hope my voice will improve, also, with time.

You have undoubtedly heard some new expressions or terms today which may seem to you at first

a little unusual, strange and confusing. It seems as though there is something about an antitrust case that tends to appal people, even lawyers I guess, and induces us to become more complicated in our thinking than we need to be.

I agree with Mr. Dixon that in the end you will find that the issues in this case are really quite simple and they will not be as complicated and appalling as they might seem at the present time. You can be assured Mr. Dixon and I will do everything within our power to see that all the terms that may be unusual that are used in this case are explained to you as we go along. In fact, of course, that is one of the purposes of the opening statement, to give you a little bit of background as to what we expect will come later, sort of a preview of what we anticipate the evidence is going to be.

I want to assure you at the beginning that although I may not at all times say that we expect the evidence will show this or that, I am always implying that introduction to everything I say. Of course, nothing I say is evidence. I am merely telling you what I honestly believe the evidence will show. It is up to you later on to see whether or not I am right, that it does show that. [155]

So even though I don't always say, "I believe the evidence will show so and so," that is what I mean.

I also must realize, of course, that you ladies and gentlemen, having been residents of California, the State which is so famous for its citrus industry, probably know a great deal more about that industry than the attorneys, or I should say at least I do, and

if I at times appear to be boresome in explaining some terms that you already know, I hope you will excuse it on the ground that I am really a foreigner.

As a matter of fact, I guess neither Mr. Dixon nor I are natives of California, although he has lived here for some time, whereas I was born and raised in Iowa and I have spent my professional life in Chicago, a fact, I hope, you won't hold against my clients.

To go to some of the terms that you will be hearing in the course of this proceeding, I would like to talk for a moment about the subject of co-operatives. You probably will hear that expression used a great deal.

Now, there are 20,000 citrus growers in California and Arizona, 20,000 farmers that are growing citrus crops. Most of these growers have organized into various groups for the purpose of having assistance in the preparation of their crops for market, and the marketing of their crops, and these organizations are frequently referred to—I am not speaking [156] in any technical sense now, but in the sense that you will have the expression used many times—as co-operatives.

There are several co-operatives in California and Arizona of the citrus farmers. The largest of those is the defendant Sunkist Growers, Incorporated. We lawyers call it Sunkist Growers, Inc., I-n-c. It will generally be referred to as Sunkist or Sunkist Growers.

And you probably should have a little more of the

background as to just what the Sunkist system is as it will be unfolded by the evidence.

To give you that background perhaps I should approach it from the historical standpoint, as I am sure the evidence will. Some years ago Sunkist didn't exist, in fact co-operatives didn't exist, and what you had was 20,000 odd farmers with their little groves scattered around California and Arizona, largely central and southern California and Arizona, each with his own little grove, with his own problem of how he was going to make his little grove grow and develop properly, his own problem of when he was going to pick his fruit and how he was going to pack it once he grew some fruit. And when he got all through if he had some packages here of his fruit, what was he going to do with them.

Perhaps there was some in Paducah, Kentucky, who would be delighted to have his fruit, but he didn't know about the man out here who had it, and the man out here didn't know [157] about the man in Kentucky.

How was he going to get it marketed?

The result was that in time one little grower would get together with his neighbor, and then with the next neighbor, so that you have the growers in a particular area develop what was called or generally is now called a packing house. The packing house is primarily for the purpose of assisting the farmer with a grove to decide when he should pick his fruit, to pick it for him, to wash it, to pack it, and to get it ready for market.

Of course when that was done there was still this problem of how he was to get it to market.

And in another neighborhood you would have farmers getting together there and forming their little packing house. They had the same problem, how would they market it.

So in time the packing houses joined together and they formed what are now known as district exchanges, and their purpose was to assist in getting this fruit on to the public.

The district exchanges would pass on sales terms, make negotiations for the sales of the product, and handle whatever was necessary in connection with that aspect of it.

Of course, as you had a number of these district exchanges each with its own problem, perhaps it was nothing but a normal step that they then got together and they formed what is now called Sunkist Growers, Inc. [158]

Sunkist Growers, Inc., act as the marketing agent for this fruit that the district exchanges receive from the packing houses who got it from the growers.

Today, during the period that we are concerned with in this particular case, there have been approximately 12,000 farmers or citrus growers that are in this Sunkist system, Sunkist organization. The average acreage of these farmers is approximately 16 acres.

You have been told that there are in a way two types of citrus fruit. One for use in the fresh market and one for products fruit.

Of course this organization is confronted with that problem.

Now, there is only a certain amount of the citrus fruit that can be sold on the fresh fruit market, that is, for use on the table as fresh fruit. The balance of it has to be made into some type of product or else thrown away, or left on the tree. Quite early, quite a number of what Mr. Dixon refers to, and I will accept his terminology for this purpose, quite a number of independent organizations grew up whose business it was to make the surplus fruit into some type of a product. The growers that were in the Sunkist organization, of course, were able to dispose of some of their surplus fruit to these independent organizations. However, there was a limit as to how much those groups would take. The growers, therefore, [159] decided to and did create their own company or organization for the purpose of using their surplus fruit to make it into products of various types, and that organization and the Sunkist system as it is today, as far as oranges are concerned, is called Exchange Orange. For the purpose of making products out of lemons, it is called Exchange Lemon.

Exchange Orange, as Mr. Dixon said, is owned by Sunkist. As to Exchange Lemon, all of the members of Exchange Lemon are members of Sunkist. They are required to be.

In the early days there weren't too many products that could be made out of the surplus fruit. It is really in relatively recent years that that industry has blossomed to the point where almost all of the

oranges can at least be made into some type of product that will bring a reasonable return.

There are a number of different products to make.

Mr. Dixon has referred to single-strength orange juice. He has referred to frozen concentrated orange juice. There is also the hot concentrated orange juice, there is pectin, and the peel can be used for some kind of stock feed. I believe now they even have certain pharmaceutical products. Then of course there can be blends of different types.

The Sunkist organization each year is confronted with the problem as to how much the crop is going to be of its farmers, 12,000-odd farmers, how much of that can go into the fresh fruit market. That brings the biggest price, of [160] course. And then how much is going to be left over.

Whatever is left over will have to be either thrown away or put into products of some kind.

They carry on a great number of studies to anticipate what these various figures are going to be, and determine how much they will have to put into products and what they can do to make the most money for their firms out of those products.

In the Sunkist system the oranges that don't go to the fresh fruit market may either be sold by Sunkist to the so-called independent processors to make various kinds of orange products, or if the independents can't take them all, whatever is left is then dumped on this Exchange Orange, this products company in the Sunkist system that growers have of their own, and it is up to that company to use up the balance of those oranges no matter how it goes about doing it.

It is its duty to use them in a manner that would bring the greatest financial return to the farmers, but they have to be used some way. And if there is no way that any more juice can be made or nobody to make any more juice, or no market for any more juice, then they have to use the peel and throw away the juice, which has happened many times in the past. But whatever is left over after the fresh fruit is taken care of and the independents have taken all they can buy, then the Products company has to use it some way or another to get rid of it.

As far as lemons are concerned, it goes much the same way, [161] except that the products lemons are all turned over to the Lemon Products Company, and they will either sell them to the independents or have to make them into products themselves.

Many years it results in their being made largely into acid, because they don't have any more market for the juice. It has to be turned out to whatever will bring the farmers the most money.

We aren't perhaps, at all concerned with lemons in this proceeding, although there is reference to Exchange Lemon.

We are concerned with products oranges, as Mr. Dixon has said.

I would like to describe to you briefly just how they go about selling these products oranges to the so-called independent processors. [162]

During the period that is involved in this particular lawsuit there was one man in the Sunkist organization who had that responsibility. It was his duty to sell the products oranges to the independent

groups, and it was his duty to set the price at which he would sell those. As Mr. Dixon has said, we are primarily concerned here with Valencias.

You undoubtedly know better than I do your Valencias start coming along in the spring, in April, May, June and get heavier in the summer time, and sort of trail off in the fall.

This particular man in Sunkist who had this responsibility of selling the products oranges to the independents, his name was Kelly. I believe it is Sam Kelly. Each year early in the year Kelly would start investigating as to how many oranges he would probably have on his hands. He would try to find out, he would find out from Sunkist, because they have their studies, what the anticipated crop was going to be, and he would find out from them what the anticipated sale would be to the fresh fruit market. Then whatever is left over has to be products fruit of some kind.

Next he would check on what was going on in Florida. Perhaps it is not new to you, but it was a bit surprising to me to find out Florida makes a larger part of the orange products in this country than Cailfornia. In fact, I think perhaps almost 90 per cent of all the single-strength [163] juice made in this country is made from Florida oranges, and approximately 90 per cent of the frozen concentrate is made from Florida oranges.

The Florida crop comes on in the fall, late fall, starts in November and December and January and February, and in March it is about through. So that

it is finished just about the time your Valencia crop starts in.

Because Florida makes such a large part of the orange products, it controls the prices of those products, and in determining what price Kelly would charge for his oranges that he sold to the independents, he had to know what had gone on in Florida that winter. He had to know what the crop had been. Had they had a frost? Had they had a hurricane? Had they had a large crop or had they had a small crop? He had to know what they had done with it. Did they put it up in single-strength juice? Did they put it up as frozen concentrate? Did they put it up as hot concentrate, or what?

Then he had to find out what had happened to the juice after it had been made. Were they selling it fast or did they have a large inventory?

Then he had to know what was the price of that Florida product.

After he got all this information, he would reach a tentative conclusion in his own mind as to what an independent [164] in California could probably pay for these Sunkist oranges. After he got that tentative conclusion, he would go to his customers—by and large he had the same customers, same independents buying year after year from him, and he had to tell them what he had in mind charging for these oranges that he sold them. He would ask them for their honest opinion as to whether that was a fair price or was not a fair price.

After he had their views, he would go over to the Exchange Orange people, the people that made prod-

ucts out of whatever is left over here in the crop, and tell them what he had in mind charging these independents, and ask them did they think that was a fair price? Could the independents make money on that? And get their views.

After he had consulted everyone that he could, he made up his own mind as to what the price should be. I believe he will testify that in making his decision as to what price he would charge these so-called independents for oranges, he had two basic tests.

No. 1, he wanted to get all the money he could for them, for the farmers, because he was representing the growers of these oranges, so he had to get all the money he could for their product.

No. 2, he had to charge a price that would enable the independent to make money, because if the independent did not make money, the independent would be out of business [165] and he would lose a customer, so he tried to draw a line between the two, and to give the farmer all the money that it was reasonable to obtain and at the same time enable his customers to make a profit.

Now, I want to take this up with respect to the year 1951, because that is the year we are basically concerned with in this lawsuit. Early in 1951 Sam Kelly obtained the information from Sunkist as to what the crop looked like out here. It looked like a big crop, like one of the biggest.

He obtained from them information as to how much would probably go on the fresh fruit market and, by the way, I think the evidence will show the

amount you can sell on the fresh fruit market is controlled by some federal government order, so subtracting that from the total crop gave him the tons of oranges that he would probably have that would have to go into products of various kinds.

He then checked the Florida situation and found what kind of a crop they had had that year, and he found what they had done with it, and he found what their price trends were for their products.

Basically, there are three types of juice products made out of your Valencia oranges. One is the so-called hot concentrate. That is a concentrated orange juice made through some hot process, and that is used largely by the beverage [166] industry. Your orange soda, for example, is made out of that hot concentrate. The hot concentrate is largely not sold to the public on grocery shelves or things like that, but it is sold to the beverage industry.

Then there is the single-strength juice you have heard about. Single-strength juice is just about what the name suggests. It is the juice as it comes out of the orange, it is pasteurized and then put in cans and sold on the grocery shelves, and you ladies know about it better than I do.

The third product is the frozen concentrate. That is largely a development since the war and, of course, you know about that. You buy one can of frozen concentrate, keep it in the frozen compartment of your refrigerator, and when you get ready to use it, you dump it in and add so many cans of water and you are supposed to get orange juice again.

Now, those are the three basic things. You can have blends and mixtures and whatnot, but basically those are the three products you get out of the Valencias here, and they are made in that order.

Your first Valencias aren't too good for single strength, but they are all right for this hot concentrate that goes into the beverages. Then later on they make single strength, and then in the summer they make more of the frozen concentrate, and normally the return to the man [167] that makes the juice, the processor, runs in the same order. He gets the least money for his hot concentrate, gets more for his single strength, and gets the most for his frozen concentrate.

Now, I say that is normally, and just like everything else, I suppose the normal never happens, but that is the way it should happen. There are variations. It doesn't always follow that, but generally speaking that is the trend, namely, hot concentrates first, and you get the least money, single strength next, and you get a little more money, and then frozen, and you get the most money.

Kelly in fixing his price knew that he would be selling oranges for this hot concentrate first, the stuff that would bring in the least money to the processor, and he tried to fix a price, not only in 1951, but as a general proposition, a price that he would not have to reduce. Now, he could raise it later on if single strength was bringing in more money, and frozen was bringing in more money, he might raise it more as the season went on, but he endeavored to fix a price he wouldn't have to reduce.

He figured if he sold oranges for hot concentrate at a price which would return the least money, and a little later on reduced the price, then the fellow that still had the stuff on hand might be hurt, so he tried to fix a price that he wouldn't have to reduce, but that he might increase. [168]

In 1951, as a result of all this study that he made, consulting his customers, consulting Exchange Orange, he hit on a price of $40 a ton. Mr. Dixon has referred to some formula. I think it is $40 a ton for oranges having a solid content of 120 pounds. But, anyway, whatever the facts are will come out in the evidence. It was $40 a ton for oranges having a certain juice content, the price which Kelly thought the man making hot concentrate could afford to pay and make money, and the price later on for single strength and frozen would be the same or would be higher.

In reaching this conclusion, he based it to a large extent upon the Florida prices, and he watched those. The price in Florida had just increased in February over January, and it increased in March over February, increased in April over March, and was on the way up.

So that was the price he set, and Kelley turned out in 1951 to be dead wrong. Between April and the middle of August, the Florida price of single-strength juice was cut in half, and if the Florida price was cut in half, and they have 90 per cent, that meant that the California price had to follow, and it did.

So much for Kelly's efforts in dealing with his customers. The evidence will show that he fixed an honest price based upon fair considerations, and through no fault whatsoever of Sunkist, the defendants, or anybody Mr. Dixon [169] has mentioned, the bottom fell out of the price that year due to Florida.

Now, to turn a little bit to the Orange Products Company, I said whatever is left over is dumped on Orange Products and they had to use it in some way. The man who ran the Orange Products Company during the period of time involved in this case is named Finley, F-i-n-l-e-y, Sam Finley. Sam Finley went through much the same study and survey that Kelly did in making his own plans, that is, he knew whatever oranges weren't sold as fresh fruit and whatever weren't sold by Sam Kelly to so-called independents, would be dumped on him and he would have to do something with them.

He made studies early in the year as to how much of the product would probably end up as products, fruit, and then he studied the Florida situation to see what they had done down there. Finley reached the conclusion and this was early in 1951, that Florida had underestimated the demand for this new product of frozen concentrate. That, as I say, had been developing since the war, but the demand for it was increasing faster than the production of it. Florida had been increasing its production of the frozen concentrate very materially in 1948 and 1949 and 1950, but not as fast as the demand, in Finley's opinion. His conclusion was that Florida had under-

packed on frozen concentrate during the [170] previous fall and winter when their fruit was available, and that they were going to run out of stuff pretty soon, and that meant that whereas normally they had 90 per cent of all the frozen concentrate, they weren't going to have any of it left, and California would have all of it, and the price was going to go up on frozen concentrate.

It was his opinion that everybody in California who could make frozen concentrate and make it a salable product and have a market for it, ought to do it, because that is where the money was, that is where the demand was, and people were going for this frozen concentrate.

He studied the amount that he thought he could make, how much capacity would Exchange Orange have to make it. He could make quite a lot of it, but he couldn't touch the oranges that he anticipated would be rolling in, as it was a large crop.

He decided the thing to do was to go out to any independent concern that he could find in which he had confidence and see if he couldn't get them to take the oranges off his hands, because it was better that he sell them to them, at least the juice part of it, rather than throw them away, or he might be left with them on his hands. He anticipated he was going to have a larger crop than he could possibly handle that year.

This was not particularly new. For some [171] years Finley had had more oranges dumped on him than he had capacity to handle, and if he didn't do something with them, didn't make juice out of them

or get somebody else to do it, all he could do was throw away the juice and save the peelings and make them into cattle feed, and the farmers didn't get very much for that.

So he started in very early in 1951 trying to find other people to help him out in making orange products, either for their own account of for him, anything to get them made.

I want to mention some of the efforts that he made to get the so-called independents to assist him in using up this big crop. As early as March of 1951, Mr. Finley contacted two independent organizations, one known as Hyland Stanford, which we will hear more about, and one known as Mission Dry. In each case he arranged for them to pack hot concentrate both for themselves and for Exchange Orange. That is the lowest paying thing. That is what the companies were in a position to make.

Not every independent is in a position to make all three of these. Sometimes they can only make hot concentrate, sometimes they can only make single-strength juice, and sometimes they can only make the frozen. Sometimes two of those and sometimes three.

These people could make hot concentrate. He went [172] to them as early as March to get them to take some of these oranges off his hands. In that way the farmers would make more money and the processors would make more money than if he would just throw the juice away and use the peels for feed.

He did enter into arrangements with them that they would make hot concentrate, both for their own

account and for the account of Exchange Orange. That was in March.

In April he went to another concern, the Bireley Division of General Foods, and he arranged for them to make both hot and frozen concentrate for Exchange Orange. He knew that he didn't have enough facilities to make all he would like to have. He arranged for them to make it for him.

In all three of these cases, he had dealt with the people in prior years on a satisfactory basis. He had had them help him out in using up his surplus before.

Early in June, when he was still anticipating he was going to have oranges running out of his ears, he contacted four more houses to see if they would help make some products for him. One of these was a company known as Harts Food Products Company. [173]

They arranged to make frozen concentrate for Exchange Orange.

He then approached a concern known as Cold Gold and made preliminary arrangements for them to make some frozen concentrate for him. He was trying to get all the frozen made that he could, because anticipating this great rise in price when Florida ran out.

This arrangement with Cold Gold fell through later on, because they couldn't make a product satisfactory to Exchange Orange that would fit in with their specifications, so it had to be dropped. But he did make his arrangements in June, and he just had

to give it up later on when they couldn't make the product.

He then went to a concern known as Case Swayne and asked them to make single-strength juice, and they turned him down. He was told that they were already committed to get oranges from somebody else to make all the single-strength juice that they could make, so they wouldn't do it.

Then he went to the Silzle people that you have heard about, and he arranged for them to make single-strength juice.

In these cases he wasn't selling oranges; he was arranging with the houses to process the fruit for him, and in most cases arrangements were made that the oil, which is quite valuable, from oranges, and the peel, would remain the product of Exchange Orange, and they would get to sell it and get [174] whatever money they could out of it. So these concerns might be making the juice, either single-strength juice or hot concentrate, or frozen, either for their own account or for the account of Exchange Orange, as I mentioned. It varied from agreement to agreement.

That was early in June when he contacted those four. In the middle of June he contacted the TreeSweet people that you have heard a great deal about and arranged for them to make single-strength juice. This wasn't a new arrangement with TreeSweet. He had had similar arrangements with TreeSweet for some years.

I believe the evidence will develop a history of those transactions. I think it will show that Tree-

Sweet was one of the early California companies to have a national product, have a product that was known throughout the nation. They didn't manufacture for the purpose of just filling the orders they might have today, but they made it for inventory and sold it throughout the year.

They had an excellent name, they made a very fine product, and Mr. Finley was always happy to deal with the TreeSweet people, thinking that the more California juice TreeSweet sold the better California juice would become known nationally, and the more it helped all the people in California making juice out of California oranges, and the more it helped Exchange Orange. [175]

In fact, there was a time when TreeSweet was better known than the product made by Exchange Orange.

He was very happy to have the advertising of California juice that he obtained through this procedure.

He arranged in the middle of June for TreeSweet to make single-strength juice, similar to the arrangements he had in prior years, which will all be shown to you.

Early in July Finley was still worried about having too many oranges. He approached Mutual Citrus Products Company, another independent organization, regarding the making of frozen concentrate, and had a general understanding that they would do this for him, they would make frozen concentrate for Exchange Orange. However, this arrangement fell through, because in the middle of July the oranges

stopped coming in—the oranges that Finley thought were going to be coming in all over him all the time let up. The deliveries became irregular about the middle of July.

In August there was an absolute shortage.

That didn't mean that anybody had made a mistake as to how many oranges had been grown. All it meant was that the growers weren't turning in their oranges, they were leaving them on the trees, and that is their prerogative. Sunkist or Exchange Orange, neither one controls when the farmers will send in their oranges. That is their decision. Although the packing houses decide when they will pick them and when [176] they will send them in. It happened that unexpectedly the farmers decided they would apparently get a higher price a little later on, so they wouldn't send any more in for the present, so his deliveries became irregular in the middle of July, and there was a shortage in August.

So that although he made this arrangement with Mutual Citrus Products early in July, actually they never made any for him because he didn't have the fruit. He shipped some cans to them, and they had to be returned because he didn't have the fruit furnished them.

Now, in the middle of July Winckler comes into the picture. I am not sure who the technical plaintiff is in this case. I assume it is the trustee in bankruptcy. But throughout the trial I think that you will find that we generally refer to the plaintiff as being, not the technical trustee in bankruptcy, but the corporation that went into bankruptcy, and that

was run and owned substantially by Mr. Winckler. That is where the case got its name, Winckler & Smith Products Company, I believe it is. Winckler was the fellow that ran that company, and you will hear him referred to.

He has been sitting at the table of counsel for plaintiff.

In the middle of July Mr. Winckler wrote to Jim Finley and said, in substance—you will be shown the letter—"I will be glad for you to use my facilities for making some products," and Finley turned him down. [177]

In September Winckler again approached Finley about using his facilities, and again Finley turned him down. And Finley told him that he didn't have fruit available. Which was true. In the middle of July the flood had suddenly ceased, it had become irregular.

A lot of these contracts that he made he couldn't go through with them because he didn't have the fruit.

In August you had a great shortage. In September the shortage became even worse. In fact, Jim Finley had to cut down TreeSweet's quota by 50 per cent. He just didn't have the oranges. And he turned down Winckler because he just didn't have the fruit, and which I believe the evidence will substantiate, that the fruit was not available for a period in July or in September.

The tide turned again in October. That fruit was still out there, the growers had been holding it for a higher price, it was getting late, they had to dump it,

and they dumped it in October, and Finley did have it coming out of his ears again in October. He had to use Exchange Lemon to help him out and process some of the oranges in October.

You will notice that in the year '51, Jim Finley, the head of Orange Products Company, scoured the waterfront, so to speak, to find people to make juice. He made all sorts of different arrangements with them. Some of them to make hot concentrate, some single strength, some to make frozen; [178] some to make for themselves, some for him, some for both; some to pay him for it based on the Sunkist juice price at the time they sold the product, some based on the price that the independent sold the product for; various arrangements, whatever he could get.

But he didn't give Mr. Winckler a contract. He turned down Mr. Winckler. He turned him down at times when he actually didn't have fruit. But he didn't approach Mr. Winckler at the times when he was looking for someone to help him out.

Now, the evidence will show why Mr. Finley did not go to Mr. Winckler and ask him to process oranges for him at a time when Finley was desperate for somebody to use up these oranges that he thought he would have.

I am not going to go into all the detail as to what the evidence is going to show as to why, but I will give you just a little general summary of it.

Finley had dealt with Winckler before. He dealt with him in 1947. Winckler hadn't been in business very long at that point, and he approached Mr. Finley for a contract to make some hot concentrate for

him. Finley didn't know Winckler too well, but he gave him a contract to make it.

It did not turn out to Finley's satisfaction. The product, at least large parts of it, were not pasteurized. They had what I believe the witnesses refer to as bugs [179] in them. They had specks in them, large specks, which made it impossible to use the product. They had what is referred to as poor cloud stability, as the pulp separated from the liquid. Some of this got mixed in with some of Exchange Orange's products that it was making and going to sell, and the whole batch had to be dumped down the sewer, and what was left over Finley finally had to re-do, reprocess. This is hot concentrate. He had to get the specks out. What he had to do was first thin it out so he could. He had to add water back into it. As he got it thinned out, he had to strain it, then he had to reconcentrate it, himself, and then pasteurize it.

And Finley was not entering into any more arrangements with Mr. Winckler.

That was only one of his reasons. He had other reasons. They will all come out in the evidence, what Mr. Finley heard of Mr. Winckler's reputation as to the type of product that he made, what he had heard as to his financial reputation.

You must remember that if Mr. Finley is making a contract with TreeSweet or Silzle, or Winckler, or anyone else, either the product is to be paid for immediately or else credit is given for it, and I think you will find in most of these contracts that they are on a deferred payment basis. That means that Fin-

ley would be producing the fruit today, getting paid sometime later for the juice, or whatever was made out [180] of it.

And Mr. Finley considered that Mr. Winckler's reputation was such that he could not extend credit to Winckler, or the Winckler corporation. I don't mean any reflection on Mr. Winckler individually. I am talking about his business. That he couldn't extend credit to that corporation, and that meant that he would have to rely upon the product Winckler made as the security. In other words, the credit wasn't any better than the product he made, and Finley considered that the product that Winckler had the reputation of making, and which he had made, to his own knowledge, was not such that he wanted to use that as security.

It was his financial reputation, his reputation as far as the product was concerned, and Finley's own experience with him, that induced Finley to stay away from Winckler, although he was doing his best to find someone to use up his oranges.

Some reference has been made by Mr. Dixon to Sunkist being the traditional supplier of Winckler, and then Mr. Dixon changed it slightly by saying that they had not been since his first period through the Bankruptcy Act in '48.

That is true. Mr. Winckler had not relied upon the Sunkist organization for his fruit since his '48 bankruptcy proceedings. He had been getting his fruit from other sources. [181]

Now, there were various other sources. An inde-

pendent was not limited to what he could get from Sunkist. There were various other sources.

Sunkist does have the largest number of growers, the largest tonnage in its organization, but there are many others, and Winckler, in '49, in '50, was not buying oranges from Sunkist; he was buying them from another source.

What happened in '51, it is true Winckler didn't make much single-strength juice, and he did have difficulty obtaining oranges. But he had difficulty in obtaining them form his traditional supplier. His supplier—it had nothing to do with the defendants in this case—decided to sell his oranges or fruit to someone else, and Winckler lost his supply through no fault of any of the defendants.

But for that I assume we would never have had the lawsuit.

Just a word about what has happened to the Winckler organization.

It is true that the Winckler organization went back into bankruptcy in 1952, and I think it is fair to say it is true that it was broke.

We went to considerable expense to try to find out why it was broke. Perhaps one of the basic issues in this case is, Did Winckler go broke because of some illegal acts of the defendants, or did he go broke because of some other reason? [182]

December 14, 1955—10:00 A.M.

* * *

Mr. Dixon: May it please the court and ladies

and gentlemen of the jury, I would like to at this time read into the record certain stipulations of fact that have been agreed to by the plaintiff and the defendant.

Item No. 1. The plaintiff is a corporation organized under the general corporation laws of California on October 29, 1945. It operated a plant for processing citrus product fruit into citrus juices and other citrus fruit products at Anaheim, California, until March 26, 1952, after which time such products as were processed at its plant were produced [188] by the trustee and intervener herein acting under the supervision and control of this court by virtue of the provisions of Section 10 of the Bankruptcy Act.

Paragraph 3. Sunkist is a California nonprofit cooperative marketing corporation incorporated on March 27, 1905. It has no capital stock and is a membership corporation, the members of which are about 22 district exchanges. [189]

The members of the latter are marketing associations and growers of citrus fruit. Sunkist maintains offices in various cities of the United States, through which it sells fresh citrus fruit. It also maintains offices in cities of the United States through which it sells citrus fruit products processed from products citrus fruit by Exchange Orange and Exchange Lemon, which sales are made by Sunkist as the exclusive marketing agent of Exchange Orange and Exchange Lemon, respectively. As a "non-profit" corporation Sunkist was organized, not to make profit for itself as such or for its members as such, but only for its members as producers.

4. Exchange Orange, sometimes referred to as EOP, is a California nonprofit co-operative marketing corporation incorporated on October 11, 1920. It it a wholly-owned subsidiary of the defendant Sunkist. Exchange Orange processes products oranges and grapefruit and markets the products therefrom in intrastate and interstate commerce through its exclusive marketing agent, the Products Department of Sunkist. [190]

* * *

Mr. Dixon: As a "Nonprofit" corporation EOP was organized, not to make profit for itself as such, or for its stockholder Sunkist as such, but only for the producer members of Sunkist.

5. Exchange Lemon, sometimes herein referred to as ELP, is a California nonprofit co-operative marketing corporation incorporated on January 9, 1915. It has capital stock which is owned by various marketing organizations——

Mr. Fisher: Correction. "associations."

Mr. Dixon: Thank you. (Continuing)—associations, and growers of lemons, which associations and growers are also members of the District Exchanges that comprise the membership of the defendant Sunkist. [191]

All lemons grown by the stockholders of ELP and sold in fresh fruit channels are marketed through the defendant Sunkist. All products lemons grown by the stockholders of ELP are marketed by it, that is ELP, either in the form received (by sale to other processors) or in processed form. The products produced from the products lemons processed by ELP

are marketed in intrastate and interstate commerce through its exclusive marketing agent, the products department of Sunkist. As a nonprofit corporation ELP was organized not to make profit for itself as such, but only for its members as producers.

TreeSweet is a California corporation——

The Court: This is 6, paragraph 6?

Mr. Dixon: No. 6—is a California corporation organized under the general corporation laws of California on July 1, 1937. It is a processor of citrus fruit into citrus juices which are marketed by it in interstate commerce. It operates a processing or canning plant at Santa Ana, California, and a processing or canning plant in the State of Florida. It's California plant has a processing capacity of 220 tons of oranges, 70 tons of lemons, and 100 tons of grapefruit per eight-hour shift. The principal product processed at the California plant is single-strength orange juice, and the principal product processed at the Florida plant is blended grapefruit juice. [192]

7. Silzle is a California corporation for profit organized under the general corporation laws of California. It is a processor of citrus products fruit into citrus juices. It operates a processing plant at Anaheim, California. Its principal product is single-strength orange juice, which it markets in interstate commerce.

11. Sunkist sold about 59.2 per cent of the Valencia oranges grown by its member-growers in 1951. The Valencia oranges not sold by Sunkist in 1951 for consumption as fresh fruit were either sold by

Sunkist independent processors or were processed by or at the direction of EOP—that is Exchange Lemon.

The Court: Exchange Orange.

Mr. Dixon: I am sorry. Exchange Orange.

12. The greater part of the following percentage of the total amount of oranges, lemons and grapefruit produced in California and Arizona during the following years was processed into citrus fruit juices. The balance not so processed was processed into cattle feeds or other products.

Oranges—this is for the year 1949—37 per cent; lemons 22 per cent: grapefruit 40 per cent.

1950, oranges 34 per cent; lemons 31 per cent; grapefruit 61 per cent.

1951, oranges 31 per cent; lemons 39 per cent; grapefruit 37 per cent. [193]

The total amount of Valencia product oranges produced by Sunkist grower-members and made available by them in 1951, including the fruit season and until the close of the pool year on November 24, 1951, was approximately 318,000 tons, which was about 40.8 per cent of the Valencia oranges produced by grower-members of Sunkist during that year. Of this amount EOP processed—that is the defendant EOP processed approximately 164,000 tons itself. About 31,200 tons were processed in the plants of ELP—that is Exchange Lemon—for EOP. Sunkist sold approximately 46,000 tons of said oranges to independent processors.

No. 13.

Mr. Williams: Just a minute.

Mr. Dixon: Yes.

Mr. Williams: We object to the first sentence of paragraph 13 as being immaterial and irrelevant to any issue in this case.

The Court: Have you the stipulation in the file, Mr. Clerk?

The Clerk: No, your Honor, we don't have it in the file.

The Court: The stipulation has not been filed.

Mr. Dixon: I have a copy for you, your Honor.

The Court: You object to the first sentence of what?

Mr. Williams: Of paragraph 13 of the stipulation.

The Court: Line 27 to line 32? [194]

Mr. Williams: Yes.

The Court: On what ground?

Mr. Williams: On the ground it is immaterial and irrelevant.

The Court: Overruled.

Mr. Dixon: 13. The member-growers of ELP produced the following percentage of the total lemon crop grown in the United States and marketed either as fresh or products fruit in the following years: 1949—88 per cent; 1950—88 per cent; 1951—87 per cent. About 99.9 per cent of the lemons produced in the United States in 1951 were grown in California and about 0.1 per cent in Arizona.

ELP marketed as product lemons or lemon products the following percentage of the total lemons produced in California and Arizona during the fol-

lowing years: 1949—20.6 per cent; 1950—23.1 per cent; and in 1951, 34.1 per cent. [195]

15. ELP had a processing plant at Corona and another at Covina, California, in 1951. The capacity of the Corona plant of ELP to process concentrated juices during 1951 was approximately 150 tons of lemons per day. During the years 1948-1949 it had no capacity to can frozen single-strength juice. It had a capacity to can and freeze approximately 125 tons of lemons per day into single-strength juice in 1950 and 1951. It also had a capacity to process approximately 125 tons of lemons into pasteurized single-strength juice per day during the years 1949 to 1951, inclusive.

The Covina plant could process approximately 300 tons of citrus fruit into concentrated juices per day. Its capacity to can and freeze single-strength orange and lemon juice was 125 tons per day. It did not process pasteurized single-strength juice.

Neither plant processed any grapefruit or blended single-strength or concentrated citrus juices. Canned lemon juices processed by ELP at its plants were shipped into 20 states of the United States during the year 1949, and into 27 states in 1950, and into 44 states in 1951.

EOP processed product lemons——

The Court: What paragraph is that?

Mr. Dixon: I am sorry. 18.

EOP processed product lemons for ELP at the Ontario, California, processing plant of EOP during 1949, 1950, and 1951, into lemon juice products, and ELP processed product [196] oranges for Sun-

kist into juice products at ELP processing plants at cost during the years 1949 and 1951 under oral agreements.

No. 26. An average ton of product Valencia oranges can be converted into approximately 100 gallons of single-strength juice and approximately 25 gallons of concentrate juice. [197]

* * *

PAUL S. ARMSTRONG

called as a witness by and on behalf of the plaintiff, under Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follow: [198]

* * *

Direct Examination

By Mr. Dixon:

Q. And your address, Mr. Armstrong, your residence address?

A. 6849 North Vista Street, San Gabriel, California.

Q. Your position with Sunkist?

A. General manager.

Q. What other positions do you occupy with Sunkist? A. No other positions.

Q. It is a fact, is it not, that you are member of the four-man management committee of Sunkist and EOP, or do you regard that as a position?

A. I would not regard that as a position.

Q. Are you also a member of the executive committee of Sunkist and EOP and ELP?

(Testimony of Paul S. Armstrong.)

A. No, I am not. No, sir, I am not, because that committee is composed exclusively of directors, and I am not a director. [199]

* * *

Q. How long have you been with Sunkist?

A. Ever since I left school. 40 years.

* * *

A. I have been general manager 24 years.

Q. Do you hold any office at all in the Sunkist organization? I mean by that an elected office.

A. Unless you might term general manager being an elected office.

Q. How long have you been general manager of Sunkist? A. 24 years. Since 1931.

Q. Up until 1952, was it, Sunkist was known as California Fruit Growers Exchange, was it?

A. Yes, sir.

Q. And at that time it changed its name to Sunkist Growers, Inc., is that correct?

A. That is correct.

Q. Is that the time that Sunkist purchased the trade name Sunkist? A. No.

Q. Or about that time? [201]

A. That was purchased, as I recall it, Mr. Dixon, about 1950.

Q. Do you recall what Sunkist paid for the name at the time it purchased that name Sunkist?

* * *

A. One and a quarter million dollars was paid to California Packing Corporation for their share

(Testimony of Paul S. Armstrong.)

of the Sunkist trade-mark, which was a divided trade-mark and had been since about 1908.

Q. I have seen the name Sunkist on, I think, various other products. I think there is Sunkist raisins. Does Sunkist have anything to do with that product?

A. No, sir.

Q. It has no interest, then, in the Sunkist raisins as such?

A. It is hard for me to make categorical answers to some of your questions, Mr. Dixon. If I could explain the background, please?

Q. Yes. I would be glad to have you do that, and I am sure the jury will.

A. The Sunkist name was conceived as a coined word about 1908. Who conceived it is a matter of some dispute. But at least it was adopted and used by California Fruit [202] Growers Exchange at that time, and it was also used by the J. K. Armsby Company, which later became a part of the California Packing Corporation. When each of those organizations tried to register the same name in the Patent Office, they ran into conflict, naturally, and that conflict was finally settled and registration granted by the Patent Office to each in their respective class of goods, because at that time the Patent Office took the view that goods might be of separate descriptive properties, and the same name or trade-mark might be appropriately used by two different fields of operations as long as there was no public confusion.

(Testimony of Paul S. Armstrong.)

So an official trade-mark registration was granted both to the California Fruit Growers Exchange for fresh citrus fruits, and granted to the J. K. Armsby Company for canned goods, dried fruits, and things of that sort.

I think it was about 1915 that an agreement was made between J. K. Armsby and California Fruit Growers Exchange in which each recognized the right of the other in their respective fields. Under that agreement the rights of California Fruit Growers Exchange to the trade-mark Sunkist were recognized by the other party when applied to citrus fruits or the products thereof. The rights recognized by California Fruit Growers Exchange in respect to the J. K. Armsby trade-mark concerned dried fruits, canned fruits, [203] and other items ordinarily sold by wholesale grocers, was the way the agreement expressed it.

As the years went along, the California Fruit Growers Exchange invested large sums of money collected from its grower-members in the name Sunkist, which was continually advertised since 1908.

The J. K. Armsby Company, when it merged with the other three elements forming the California Packing Corporation, adopted the trade-mark Del Monte as their particular trade-mark and just used Sunkist as a secondary trade-mark, although both parties had agreed in the agreement and maintained that agreement to use the Sunkist name only on first quality merchandise.

(Testimony of Paul S. Armstrong.)

Q. May I interrupt there? Perhaps the jury doesn't know, and I am sure I don't know. What do you mean by first quality merchandise?

A. First grade or what you might call U. S. 1 in some products, top quality, such as Sunkist is used on oranges today.

Q. You are referring then to the use of that terms as applies to fresh fruits?

A. Yes, and as applied by the California Packing Corporation to canned peaches or raisins, or whatever they might put out under the Sunkist trade-mark.

As our retailing has become more complicated and the [204] stores larger and more things are handled in the same store, the opportunity for confusion of the public in thinking that both canned fruit and the fresh citrus fruit might come from the same source, grew. Our trade-mark attorneys cautioned us for a long time that we should acquire the rights possessed by California Packing Corporation in that trade-mark, and that was brought to a very sharp focus by the passage of the Lanham Act some five years ago or more, which was the first trade-mark legislation, as I recall it, of basic character since 1905.

While it did not destroy the rights granted to trade-mark holders under the laws of 1905, it did establish some new standards, and our trade-mark counsel, Lyon & Lyon, recommended very strongly that we acquire the trade-mark rights of California Packing Corporation in the Sunkist name which

(Testimony of Paul S. Armstrong.)

they were using in a less major way than we were.

Also, we were confronted with this predicament. When you can orange juice, for example, is that a product of citrus fruit or is it a canned product? It was sort of a no-man's-land that neither one of us could resolve. So neither of us used Sunkist on our products goods because of our agreement, one with another, which we faithfully kept all these years.

It was for that reason and to give us the opportunity without dispute and without going back on any agreements, [205] that we acquired that trademark right from California Packing Corporation, for which we paid $1,250,000.

Q. I believe you used to use the Exchange label or brand on some of your products?

A. Yes, sir.

Q. Was the product bearing that label the same as the product which bore the Sunkist label when you put the Sunkist label on the product?

A. Approximately so. Of course, when Sunkist was put on it, we adopted much more rigid and exacting standards than had heretofore been applied to the name Exchange, but that was a top grade, you might say, of the products of both lemon and orange products.

* * *

Q. Now, the stipulation that we read—you heard it [206] read, I believe? A. I did.

Q. Reference was made there to Sunkist as a non-profit corporation. That language was used. I

(Testimony of Paul S. Armstrong.)

think we all understand that a hospital, perhaps, or a school, that is a university, or something, may be non-profit. Is Sunkist in that classification as far as it is concerned, just using that as a comparison, as a non-profit corporation?

A. It would not be considered in the same class as a hospital or educational institution. It is a business organization, but it operates without profit to the corporation in that the proceeds of sale which it makes on behalf of its grower-members through their associations and their district exchanges are returned in toto to the—eventually to the growers less only the actual cost of operation, the corporation retaining nothing except minor reserves for contingencies and bad debts, things like that, to itself.

Q. Sunkist then, if I understand you correctly, is really a broker or a marketing agent for the citrus products that are grown by its members, is that a fair statement?

A. I would call it a non-profit marketing agency, rather than a broker. The term broker usually is applied to an operation for profit.

Q. But it is selling its products for the profit of its growers, is it not?

A. Yes, sir, we hope. [207]

Q. And it operates for the purpose of making money on what it sells for the growers, does it not?

A. For the grower, but not for itself.

Q. Of course, Sunkist is just an association, the

(Testimony of Paul S. Armstrong.)

members of which are somewhat like stockholders, are they, in a private corporation?

A. Yes, but they are much more intimately related than are the stockholders to a corporate structure. Their very livelihood depends upon the success of Sunkist.

Q. The members, for example, of Sunkist, the producers that grow the oranges and the grapefruit, do they own or have any interest in the Sunkist Building from which you conduct the operations of selling its products of its members?

A. Yes, they do.

Q. The primary function, then, I take it, that Sunkist performs is really to, first, sell as fresh fruit all of the products, that is, the oranges and grapefrut that are grown by its members; is that a fair statement, Mr. Armstrong?

A. That is correct, Mr. Dixon.

Q. And the fresh fruit of its members that it doesn't sell, that is what we call by-product or product fruit, is that a fair statement or description?

A. As a general term, that is correct.

Q. And this product fruit, what happens to it insofar as Sunkist is concerned? Does it have the responsibility of [208] disposing of that fruit, as well as the fresh fruit? A. Yes, it does.

Q. What kind of an organization is set up by Sunkist, if any, to dispose of the product fruit?

A. I might preface that answer by saying that the decision as to whether fruit is shipped to the fresh market or goes to the products destiny is made

(Testimony of Paul S. Armstrong.)

by the association that ships the fruit, not by Sunkist, the central organization.

Q. But it is marketed by Sunkist, is it not?

A. It is marketed by Sunkist.

Q. For the association member of Sunkist?

A. That's right. The farmers——

Q. Pardon me. I didn't mean to interrupt you, but the association member—or what did you call it, district exchange, did you use that term?

A. I used that term.

Q. The district exchange cannot in and of itself, without further consultation with someone at Sunkist, just on its own, sell the fruit of its exchange, can it?

A. No, it cannot. The contract that is in effect and is subject to annual withdrawal by the association or the district exchange provides that all fruit under the control of such association or such district must be marketed through the Sunkist growers organization in whatever form it may be marketed. Part of it is marketed as fresh fruit, and [209] part of it is marketed as processed products. The Sunkist organization contains as a part of the system two products companies which have been referred to here, one being Exchange Orange and the other Exchange Lemon. The function of those companies is to receive the fruit of products classification on which the decision not to ship to fresh market has been made by the association, and to recover from it all of the valuable constituents that they can.

(Testimony of Paul S. Armstrong.)

The orange company, Exchange Orange, does that for oranges and grapefruit; and Exchange Lemon does it in respect to lemons.

Q. Now, getting back to this product fruit, let's talk about oranges for a moment. What does Sunkist do with that fruit and how is it handled and disposed of?

The Court: Fresh fruit are you referring to?

Mr. Dixon: No. I am talking about the products fruit.

The Witness: The products fruit is sent to the products company, either the orange or grapefruit to Exchange Orange, or the lemon to the Exchange Lemon. It is processed into products, and then the products made from such fruit are turned over to the Products Department of Sunkist Growers to sell in the markets.

Q. (By Mr. Dixon): If I understand your answer correctly, Mr. Armstrong, the Exchange Orange Company, then, that is this 100 per cent subsidiary of Sunkist, is the company that [210] handles the product oranges and grapefruit of the members of Sunkist; is that correct?

A. It is the processing facility of Sunkist Growers for oranges and grapefruit.

Q. And it actually processes some of the fruit that comes into its control? A. Most of it.

Q. And it also sells some of the oranges and lemons which come into its control, does it not?

A. No. At the time you are speaking of the oranges that were not processed by the Exchange

(Testimony of Paul S. Armstrong.)

Orange Company were sold by Sunkist Growers through another department to outside processors.

Q. I guess I didn't make a fair statement. I must admit that I am somewhat confused now. I thought that all of the product oranges and lemons —let's confine this to 1951——

A. That is what I am talking about.

Q. ——was handled by Exchange Orange Products; is that or is that not the fact?

Mr. Stark: Was that oranges and lemons or oranges and grapefruit?

Mr. Dixon: I am sorry, counsel. Oranges and grapefruit. Thank you.

The Witness: The oranges and grapefruit are under contract to Sunkist Growers. When the association decides not to [211] ship to the fresh market the products portion of that fruit is disposed of by Sunkist Growers by sending a portion of it to the Exchange Orange Products Company for processing and selling to other processors through its sales department some of such fruit, the amount varying greatly depending upon supply and demand.

Q. (By Mr. Dixon): Supposing I was an independent processor of oranges and lemons in 1951 —I am sorry—oranges and grapefruit, and I wanted to buy some oranges for processing purposes into citrus fruit juices, where would I go to find out in your organization whether you had any oranges or grapefruit that I could buy or otherwise get under any other arrangement fro processing into citrus juices?

(Testimony of Paul S. Armstrong.)

A. In that year you would have gone to the citrus distributing plant, which is located on Ninth and Alameda Streets, and where the selling operation for that portion of the fruit is centered, at that time under the direction of Mr. Sam Kelly.

Q. Then I would go to Sunkist, I take it.

A. Oh, yes.

Q. And I wouldn't go to Exchange Orange?

A. Correct.

Q. So that if I bought any I would be buying the product that I wanted to get from Sunkist and not Exchange Orange? A. Yes, sir. [212]

Q. Now, you have mentioned something about your arrangement with Exchange Lemon; can you tell us a little bit more about that? It is not a part of Sunkist as such, is it?

A. It is part of the Sunkist system, but its genesis is a little bit different than the Exchange Orange Products Company. The making of by-products out of citrus fruit was a rather daring adventure when that was started. In 1915 nobody had the know-how, you couldn't read the chemistry of it out of books, and you had to learn the hard way how to do it. Not all of the associations were willing to risk their capital and incur the cost involved in making such products, so a portion, less than all, of the association members at that time organized the Exchange Lemon Products Company, and they undertook to learn how to make various products out of lemons, like citric acid and lemon oil, and later on some of the juice products. But as it became necessary un-

(Testimony of Paul S. Armstrong.)

der the federal marketing agreement to have a place to which the fruit not shipped as fresh fruit could go, so as not to be wasted, it was made a requirement of California Fruit Growers Exchange, now known as Sunkist Growers, that any association shipping lemons through the Sunkist organization must, as a prerequisite, be a member of Exchange Lemon Products Company.

The Orange Products Company, I might add, was started in much the same fashion in 1916 and had one very great failure when we undertook to make marmalade on a big scale and ran [213] into World War I, when sugar I think was 30 cents a pound, and you either—well, I don't want to go into that.

That was a rather sad chapter in the Orange Products history. That discouraged a lot of the associations that had grubstaked the venture to start with, and it took a year or two to reorganize it.

That went along owned by the association shipping oranges and not by all of the association members of Sunkist, until about 1931, when, because of the necessity of having a place to put all of the oranges not shipped as fresh fruit, the Sunkist organization undertook to make those facilities available to all of its member associations, and to that end it purchased from those who then owned it, less than all of the associations, their equity, and ever since it has been a wholly-owned subsidiary of Sunkist. [214]

The Court: Now, can we sum this up by saying

(Testimony of Paul S. Armstrong.)

that as far as Exchange Orange is concerned, it is wholly owned by Sunkist?

The Witness: Yes, your Honor.

The Court: But as far as Exchange Lemon is concerned, it is a membership corporation which is owned in turn by an association at San Dimas or one at Escondido, all over Southern California?

The Witness: That is correct, your Honor, except it is a stipulated requirement all lemon associations shipping through Sunkist must be members of Exchange Lemon Products Company.

The Court: I see. But as far as carrying out the duties of processing for Sunkist, Lemon performs the same function for lemons that Exchange Orange performs for oranges, for Sunkist?

The Witness: That is correct, your Honor, with the additional statement that it is mandatory that the lemons not shipped as fresh fruit are under contract to Sunkist Growers and it turns the products lemons over to ELP company—Exchange Lemon Company, as its processing facility. [215]

* * *

Mr. Dixon: Plaintiff offers Exhibits 1, 2, and 3 in evidence.

Mr. Williams: No objection.

The Court: Exhibits 1, 2, and 3 received in evidence.

(The exhibits referred to were received in evidence and marked as Plaintiff's Exhibits 1, 2, and 3.)

* * *

(Testimony of Paul S. Armstrong.)

Q. (By Mr. Dixon): When we recessed, Mr. Armstrong, you were starting to tell us something about the arrangement [217] between Sunkist and Exchange Lemon. Will you refer to Plaintiff's Exhibit 1, and particularly paragraph 24 therein, and state if you can whether that deals in any way with the arrangement between Sunkist and Exchange Lemon?

By the way, we might tell the jury that Exhibit 1 is known as 1940 Exchange District Exchange Association Agreement.

The Court: You have too many "Exchanges."

That right, 1940 Exchange District Exchange Association Agreement, you are right.

(The question was read by the reporter.)

The Witness: The exhibit referred to, No. 1, is the contract between the Exchange, which is now known as the Sunkist Growers, the 22 district exchanges, and the associations that comprise the Sunkist system.

The Court: In other words, this was the master contract which Sunkist Growers, then known as California Fruit Exchange, signed, and in turn was signed by the various exchanges and associations throughout the area?

The Witness: Correct, your Honor, each part representing one instrument, they all signed it, both the districts and the associations.

Section 24 thereof reads:

"Exchange Lemon Products Company

(Testimony of Paul S. Armstrong.)

"Associations handling lemons agree to execute the Exchange Lemon Products Company 'Agreement Subscribing for [218] Stock and Creating Exchange By-products Company Revolving Fund,' and amendments thereto."

That is the provision in the contract which requires, as I stated previously, that all associations shipping lemons in the Sunkist organization must as a prerequisite be also members of the Exchange Lemon Products Company. [219]

Q. So that in fact, then, any member of Exchange Lemon is also a member of Sunkist; is that a fair statement, Mr. Armstrong?

A. It is not quite as simple as that, Mr. Dixon.

Q. I am trying to simplify it, if I can.

A. The real basic members of Sunkist are the farmers, the growers. There are some 12,000 of them. They are organized into different groups for different purposes. They have their association for packing. They have a district exchange for selling. The associations have these products plants for processing.

In the broad sense, the growers of one are also members of another by virtue of these facilities that have been set up for their use, but corporately they are not.

Q. Please refer to Plaintiff's Exhibit 2, the same being an agreement between Sunkist, Exchange Orange and Exchange Lemon, dated April 6, 1949. Is there anything in that exhibit that will

(Testimony of Paul S. Armstrong.)

help us and the jury to understand the relationship between Exchange Lemon and Sunkist?

A. Yes, I think there is a great deal in that agreement that would be helpful.

Q. Do paragraphs 1 and 2 of that agreement fairly state the arrangement?

A. Those two paragraphs are helpful in setting forth that arrangement, but to be completely informed, you should [220] include also paragraphs 3 and 4.

Q. Well, you mean paragraphs numbered 3 and 4?

A. No. The preamble, the complete preamble, you might say, prior to the numbers.

Q. Well, perhaps it might be helpful to read this to the jury. A. It would.

Mr. Dixon: It is my understanding that this document will be available to you, ladies and gentlemen of the jury, as part of the evidence in this case, but to enable you to perhaps more easily understand the relationship, I will read this to you at this time.

The Court: Before you start to read it, in the very first paragraph the word Exchange is used, and I take it that means the old California Fruit Growers Exchange.

Mr. Dixon: That is my understanding.

The Court: Which is now Sunkist.

Mr. Dixon: That's right.

The Court: So in reading it——

Mr. Dixon: We can perhaps make that change.

(Testimony of Paul S. Armstrong.)

The Court: Call that Sunkist.

Mr. Dixon: Is that agreeable, counsel?

Mr. Williams: That is agreeable.

The Court: Then call it Sunkist.

Mr. Dixon: Sunkist is incorporated for the purpose of [221] providing the facilities through which its members may market their citrus fruits and the products thereof. In an agreement entitled "1940 Exchange District Exchange Association Agreement"——

That is Plaintiff's Exhibit 1, which we have referred to, and now continuing to quote:

"The responsibility of marketing all of the citrus fruits and products of its members rests with Sunkist. Products companies are corporations incorporated for the purpose of developing and manufacturing products of citrus fruits. The only stockholder of the Exchange Orange is Sunkist, and the stockholders of Exchange Lemon under the terms of the aforementioned '1940 Exchange District Exchange Association agreement' "——

That is Plaintiff's Exhibit 1, which we have heard about.

"are all associations shipping lemons affiliated with Sunkist. Sunkist in observation of its responsibility to market all the fruit and products therefrom of all its members, by resolution of its board of directors dated September 4, 1940, designated products companies as agencies for the ultilization and disposal of oranges and lemons not sold for consumption as fresh fruit. In further recognition of

(Testimony of Paul S. Armstrong.)

the obligation to market all of the fruit of [222] its members, Sunkist has established a department for the distribution and sale of citrus fruits in by-product or processed form known as 'Products Department, Sunkist.' It is the desire of the parties hereto to establish certain principles for the most effective use as a joint sales agency of products department.

"In consideration of the foregoing, it is agreed by and between the parties hereto as follows:

"1. Sunkist hereby delegates to a joint executive committee the managment of products department in all of its operations with authority to execute contracts for the sale of products marketed under its jurisdiction, provided, however, that in respect to any operations of products department in which the fresh fruit interest of Sunkist is directly involved, the nature of which interest Sunkist shall be the judge, Sunkist may approve or disprove any policy or course of action of products department."

The Court: This means that a department of Sunkist was set up called products department which was run by a joint executive committee of 16 members, eight of which came from Exchange Orange and eight from Exchange Lemon?

The Witness: Yes, your Honor. [223]

The Court: With Sunkist keeping a veto power on anything involving fresh fruit?

The Witness: Yes, sir. [224]

Q. (By Mr. Dixon): This products depart-

(Testimony of Paul S. Armstrong.)

ment, that wasn't a separate corporation, was it, Mr. Armstrong?

A. No, sir; it was a regular department of Sunkist Growers, it was not incorporated.

Q. This executive committee that was referred to, was that the committee of four so-called, or 15 members? In other words, I am somewhat confused, and that is why I am asking the question. As I understand it, there were two committees, one of 15 members, which was referred to as the joint executive committee, and then there was another joint executive committee composed of four members; is that correct? A. No.

Q. Well, will you straighten me out and tell me what the difference is between the two committees, if there were two committees?

A. The joint executive committee is named in this instrument. Each company, Exchange Lemon and Exchange Orange, is entitled to have eight members representing it upon this committee of 16. That is the committee to which has been delegated by Sunkist Growers the authority to manage the operations of Products Department, which would ordinarily be managed, just as any other department, by the general manager, but in this instance it is managed by this committee, because it is a tool or a facility for selling products only [225] which are not sold through our fresh fruit sales organization, and are managed by this committee.

Now, the other committee to which you refer is merely an informal consultation of the plant man-

(Testimony of Paul S. Armstrong.)

agers, the lemon plant manager, the orange plant manager, the general manager of Sunkist, and the manager of the products department, just like we have department head meetings. They have no authority, no formal status, but it is merely the exchange of information and views.

The Court: What do you call that committee of four?

The Witness: We call it a management committee, because it is made up of managements. But they have no authority to manage, except their own company. It is not like the management committee of an ordinary corporation which usually has a lot of authority.

Q. (By Mr. Dixon): Then if I understand your answer, Mr. Armstrong, this 15 member executive committee——

The Court: 16.

Q. (By Mr. Dixon): 16, was charged with the responsibility of marketing or disposing of the product fruit of Sunkist and Exchange Lemon, is that correct?

A. Well, not exactly the way you state it, Mr. Dixon.

This joint executive committee has the right of supervision and direction on policy of the products department. The products department is made up of employees who are on [226] the payroll of Sunkist Growers, and——

Q. May I interrupt?

(Testimony of Paul S. Armstrong.)

A. The management of the actual selling, of course, is done by the salaried employees.

Q. The products department that you have referred to of Sunkist, they are all employees of Sunkist, are they not? A. Yes, surely.

Q. And paid by Sunkist? A. Yes.

Q. Are they under the supervision or control in any way of this joint executive committee that you are talking about?

A. Yes, they are. That is exactly what the joint executive committee is for.

Q. Can they be hired and fired, for example, by that committee? A. Yes, sir.

Q. And have any of them ever been hired or fired by that committee to your knowledge?

A. Yes, sir, and their compensation is fixed by that committee.

Q. Would their compensation, and so forth, be set forth, or anything in connection with it, in the minutes of this 16 member executive committee?

A. Yes, it would. [227]

Q. This four member executive committee that you have referred to, that is what you call an executive management committee, is that correct?

A. Well, I called it a committee of managers, because it is made up——

Q. Who appoints the members of that committee? A. Nobody. We appoint it ourselves.

Q. Do you mean it is a self-operating committee?

(Testimony of Paul S. Armstrong.)

A. Yes, we just get together to talk over what is going on in the business as a whole.

Q. And the members of that committee consist of yourself? A. Yes.

Q. And Mr. Finley? A. Mr. Finley.

Q. Of Exchange Products?

A. Exchange Orange.

Q. I mean Exchange Orange.

A. Yes. Mr. McMillan of Exchange Lemon, and Mr. Don Thompson, the manager of the products department, and Mr. Wilcox, assistant general manager of Sunkist. Now, they don't meet regularly——

The Court: That is five.

Q. (By Mr. Dixon): Is it a five-man committee?

A. We call it five. It has no authority or no status. [228] It is a consulting committee.

Q. This executive committee, this 16 man executive committee, does it have anything to say about the prices at which products oranges should be sold to processors, independent processors?

A. No, it does not.

Q. It has nothing whatever to do with a determination of the price, then, at which product oranges shall be made available to processors?

A. No, sir.

Q. Isn't that part of the marketing of the product oranges of the association? Or isn't it?

A. Yes, but that decision is left to the one who is actually in charge of that operation. In the case

(Testimony of Paul S. Armstrong.)

of product oranges and grapefruit that was sold by the Citrus Distributing Plant under Mr. Kelly.

Q. This 16-member committee, then, is not concerned with the price at which the product oranges are sold at all, is that correct?

A. Well, the word "concerned" has a double meaning. They are always concerned with the price at which they sell, I can assure you. But they have no official direction of their selling. That is left to the employee staff.

Q. Who authorizes the employee staff to fix the prices at which the product oranges shall be [229] sold?

A. The manager of the department that is selling it.

Q. Is there any place from which his authority stems, specifically, to fix the prices at which the product oranges shall be made available to processors?

A. No, not officially. Of course, we talk about these things together, naturally.

Q. Does this 16-member executive committee have anything to do with determining the price at which the products—by "products" I mean the citrus juices and other products that are processed from oranges—are sold?

A. No, they do not. They are a policy committee, and they leave the determination of prices to the manager of the department, Mr. Thompson.

Q. Can you tell the jury just what this 16-member policy committee is supposed to do?

(Testimony of Paul S. Armstrong.)

A. They are like Congress, they make the appropriations, which is a very important function, and they hire the personnel, and they decide upon the broad policies of the organization. If any construction is necessary, for instance we have an office building which came in later than this case, that would be under their jurisdiction.

Q. But it does not concern itself directly with the marketing of any of the products of the association?

A. No. It hears the reports from the operating staff, just like a board of directors would, but they do not set the [230] prices themselves.

Q. Mr. Armstrong, I believe some place in Plaintiff's Exhibit 1 there is a reference to by-product or plan for pooling of by-product and juice-grade oranges; is that term in any way familiar to you?

A. Yes, sir.

Q. Can you state to the jury what is meant by plan for pooling of by-product and juice-grade oranges?

A. The purpose of the plan, Mr. Dixon, is to establish the equities between those who contribute fruit for processing purposes, whether it is processed in the plants owned by the growers themselves, or whether it is sold to anyone else. To do that you must have some standards which all growers can be aware of and can rely upon. So the board of directors at Sunkist Growers approved a plan drafted by management.

Q. By management you mean who?

(Testimony of Paul S. Armstrong.)

A. Of Sunkist Growers. (Continuing): for the pooling of by-product and juice-grade oranges.

That plan is subject to review every year. There is a provision in the contract, in Plaintiff's Exhibit No. 1, known as 14(b), which establishes the voting power in setting up such a pool. It requires a 75 per cent concurrence of the variety under consideration. [231]

Q. (By Mr. Dixon): Now, who formulates this pool plan within the Sunkist organization?

A. Well, the management team, department head, manager, assistant manager, secretary.

Q. In other words, it is formulated——

A. Strictly a management function.

Q. And then submitted to the board of directors of Sunkist, where it is approved?

A. For their approval or amendment or modification, as they may see fit, like any other management recommendation.

Now, this pool provides for the length of time that it covers the standards under which the product fruit is received into it. We use an assay method, you might say, for oranges based upon the number of pounds of solids per ton, and par on Valencia oranges is about 110 pounds of solids per ton. The fruit delivered is assayed from sample to determine the equity of the association making the delivery.

Q. May I interrupt you there, Mr. Armstrong?

A. Surely.

Q. I am not sure I understand, maybe the jury

(Testimony of Paul S. Armstrong.)

does, what you mean by determine the equity of the association.

The Court: Well, give a sample of fruit coming coming from one area where it was sub par, and coming from another area, where it was over par, and how you handle that.

The Witness: Well, this products fruit is developed [232] every day in the 160 or odd packing houses that operate in the Sunkist organization. It is a part of their crop that is currently handled that is not shipped to the fresh market. That fruit has to be taken away promptly, sometimes several times a day from some of the larger houses, and delivered to either independent processors, who may have acquired it, or to the Exchange Orange Products Company plant at Ontario.

Now, when it comes into the plant, there has to be given a credit to the delivering organization and that credit is dependent upon the weight in tons, and then the credit from a quality standpoint depends upon the assay in terms or soluble solids per ton, which is made in the plant.

Then once it is received into the plant it is commingled with fruit from other sources, which may have different assays and different weights, but that original credit or equity, as I term it, to the delivering association is carried right through the accounting system and the proceeds of sale after the expenses are met are disbursed upon that formula. You might have from one district a load of fruit that showed an assay of 90 or 110 pounds of

(Testimony of Paul S. Armstrong.)

solids. In many years, as you know, because this is a dangerous business, we have frost, and if you have a frost, your assay of that fruit is way down.

Q. May I interrupt for just a moment? We may have occasion to use this term soluble solids, I believe it is, [233] during the course of this case?

A. Yes.

Q. Will you explain what is meant by that to the jury?

A. Well, that is the general term given to all of the constituents that are inside of the juice part of the orange, except the water. In other words, it includes citric acid, it includes sugars of various types, and other dissolved solids that constitute the real substance of the orange juice.

The Court: Let me see if I can state this in simple language here so the jury will understand what the situation is. In these pooling agreements where this fruit comes into this central place at Ontario from 126 different associations or exchanges, once the fruit gets there, it is all mixed together, and so the question is what credit, what amount has each one of these association earned for the by-product fruit that they have sent in. Now, if the product was all alike, all you would have to do is take the tonnage of it and that would be easy to find out. One group forwarded 10 tons and another 100 tons. But fruit varies. Based on this question of analysis of what the soluble solids are, some fruit will be up and some will be down, some

(Testimony of Paul S. Armstrong.)

above and some below par. Therefore, this fruit, as it comes into the Ontario plant has to be analyzed by sample to find out what the content of the fruit is, and after that is done, on the basis of the [234] analysis made, figured against the number of tons that were brought in, a certain figure is arrived at, and then the fruit is dumped together, and from that time on it doesn't make any difference whose fruit it is. Each association knows what it is going to get. Its fruit came in, and if it was a little above par, it gets a certain figure. If it had 10 tons, it would amount to something above 10 tons. The fruit that came in that was below par in solids would get a litle less than 10 tons, and that that was over 10 tons would get a little over 10 tons as a practical matter.

Do you understand what they mean now by this pool?

Mr. Dixon: Thank you, your Honor.

The Witness: If I might interpolate a statement here?

Q. (By Mr. Dixon): Certainly, go ahead.

A. The fresh fruit is handled in much the same manner. It doesn't grow all the same on the tree. When it comes into the packing house, the individual grower has to get credit for the size product he brings in and credit for the grade of it. Otherwise, it would be all reduced to a common level, and there would be no incentive to be an excellent grower. Great care is taken with this, we are meticulous about it, to see that the rewards for superior per-

(Testimony of Paul S. Armstrong.)

formance go to the people who deserve it for the quality product they deliver.

The Court: That's right, because the fresh fruit is [235] also mixed.

The Witness: Yes. As soon as it gets to the carload, you don't know what grower it came from.

Q. (By Mr. Dixon): Mr. Armstrong, I was about to ask you something about soluble solids. Is it a fair statement that the average ton of Valencia oranges would produce about 120 pounds of soluble solids?

A. Well, that would be my recollection, although I am not a technical man and I wouldn't want to be held to that type of definition.

Q. I understand it may vary? A. Yes.

Q. A ton of oranges may vary from 60 pounds, or even lower than that, up to 140 pounds of soluble solids per ton?

A. That's right. That varies with the different seasons and with the different varities, so that one year you might average 110 pounds of solids, and another year 120. Some will rise above it and some will fall below.

Q. But you strike an average, that would be a fair statement? A. Approximately so.

Q. Now, directing your attention to Plaintiff's Exhibit No. 3, paragraph 15-A, under this pooling agreement, it is contemplated, is it not, that some of this product fruit that is pooled in the manner that you have described [236] shall be made available to independent processors?

(Testimony of Paul S. Armstrong.)

A. That section entitled 15-A relates to that purpose, yes.

Q. And I think, with consent of counsel, we will read paragraph 15-A to the jury so that they may know what we are talking about.

The Court: Now, that Exhibit 3 is an agreement between whom? I don't have a copy.

Mr. Dixon: I will see if I have a copy for you, your Honor.

The Witness: It is a pooling plan established by the board of directors I refer to in my testimony.

The Court: Can we take that as a fair statement? It is the pooling plan that was established by the the board of directors of Sunkist?

The Witness: Yes, sir.

Q. (By Mr. Dixon): And in effect for the year 1951, that is during the year 1951?

A. I would have to see the date, please. This is entitled plan for pooling of by-product and juice grade oranges effective beginning 1951-52 pools. So that would be the season following the shipments of 1951, because our fiscal year commences on November 1, and this would be pertinent to the season running from November 1, 1951, to October 31, 1952, but it is substantially the same. I [237] wouldn't think there is much difference.

The Court: You mean it is substantially the same as the period just before?

The Witness: Yes.

The Court: All right.

Mr. Dixon: We are—at least I am referring to

(Testimony of Paul S. Armstrong.)

the pooling plan that was in effect during the year 1951.

The Court: The witness has said that this was in effect beginning November 1, 1951, and that the plan prior to November 1, 1951, was substantially the same.

Mr. Dixon: Counsel are in agreement that paragraph 15 is the same in substance as in—well, this is the one I thought I was talking about. With the permission of the court, let's withdraw——

The Court: Let's leave 3 here and mark the other one 3-A.

Mr. Dixon: All right.

The Court: It will be marked A.

Mr. Dixon: Plaintiff's Exhibit 3-A is offered in evidence.

Mr. Fisher: I do have a copy of that for the court.

The Court: 3-A in evidence.

(The exhibit referred to was marked Plaintiff's Exhibit 3-A and received in evidence.)

The Court: Now, 3-A was for the period from November 1, [238] 1950, to November 1, 1951?

The Witness: That is correct, your Honor.

Q. (By Mr. Dixon): Now, referring to paragraph 15-A of Plaintiff's Exhibit 3-A, my previous question now applies to Plaintiff's Exhibit 3-A. Did that contemplate the sale of any product oranges to independent processors during the year

(Testimony of Paul S. Armstrong.)

1951? A. Yes, it does.

* * *

Q. State, if you can, whether the Valencia oranges within the product orange group we have just described constituted [239] the greater part or percentage of the product fruit available to processors under that provision? A. Yes.

Q. It is a fact, is it not, that about 70 per cent—is that a fair percentage—of the total amount of product oranges available for processing purposes are Valencia oranges?

A. I would say so, approximately, although that will vary from season to season.

Q. Now, directing your attention to paragraph B, subsection (1), that section refers to establishing a schedule of prices at which this product fruit referred to in A shall be sold, is that correct?

A. Yes. That is designed to set forth the difference in the analytical characteristics of the juice, as we referred to before, of solids per ton.

Q. I am not sure that I recall what committee or group it was that was to deal with the establishment of the schedule of prices for this product fruit.

A. There isn't any committee that deals with it. It is handled by the sales department selling products oranges to outside processors.

Q. Is there a price list that is established by Sunkist under this provision during the processing season that is circulated among the independent

(Testimony of Paul S. Armstrong.)

processors, indicating the [240] prices at which Valencia oranges will be available for processing?

A. I personally do not recall the exact form in which they make these prevailing prices known to the customer. They are on the telephone with him. It may be that they get out a list that is not under my immediate supervision.

Q. Do you have anything to do with the determination of the selling price for product fruit under this provision? A. No. [241]

Q. Are the price lists that are established by someone in Sunkist under paragraph 15-B ever submitted to you before they are sent out to the independent processor?

A. Well, Mr. Dixon, I don't recall that I have ever seen such a price list. But of course I become familiar, by telephone or other contact, with the prevailing price. And it is not a fixed price for the season: if fluctuates with supply and demand. Mr. Kelly was charged with the responsibility of getting as much as he could get for the fruit from outside processors.

The Court: Who is Mr. Kelly?

The Witness: He is the manager, division manager, of the Los Angeles District under whose jurisdiction that falls.

The Court: I don't get that.

Read that.

(Answer read by reporter.)

The Court: Of Sunkist?

(Testimony of Paul S. Armstrong.)

The Witness: Of Sunkist. Because Sunkist sells its fruit to outside processors; not the Exchange Orange.

Q. (By Mr. Dixon): I take it, then, that you would not be able to indicate whether you saw or didn't see the price sechedule which might be established under paragraph 15-B during the year 1951?

A. I couldn't recall. I am not unfamiliar with the prevailing prices, but we are selling fresh fruit and doing [242] many other things, and I don't attempt to pass upon those prices, even thought I might have the authority if I chose to exercise it.

Q. Do you have the authority?

A. I don't know. I never used it.

Q. How did Mr. Kelly get his authority?

A. By being appointed Division Manager in charge of that operation. But it is our policy not to interfere with managers very much in carrying out their function, because they know more about it than we do.

Q. Mr. Kelly is with Exchange Products Company, is that correct?

A. No, sir, he is with Sunkist Growers. He is now retired, but he held that position in 1951.

Q. Mr. Kelly, then, in 1951 was the one who was determining the price under this Section 15-B?

A. Yes, in general. He consulted with some of his associates, no doubt.

Q. Was this another committee function, or was it one which was vested in Mr. Kelly?

A. Strictly a management function.

(Testimony of Paul S. Armstrong.)

Q. Well, I am not sure——

A. It was not a committee function.

Q. It was not a committee function?

A. No, sir. [243]

Q. Was Mr. Kelly the one who decided what the price was in the event there was a view by others in the Sunkist organization different from his concerning the price? A. Yes, sir.

Q. In other words, Mr. Kelly had the last and final word? A. Yes, sir.

Q. That was true all during 1951?

A. Yes, sir.

Q. So that any oranges that were sold to independent processors by Sunkist in 1951 would have to be sold under prices that were determined and fixed by Mr. Kelly, is that correct?

A. Yes, it could be stated that way. Of course, Mr. Kelly sought advice from the buyers and from everybody else. But when he made up his mind, that was it.

Q. My point, what I am trying to determine, Mr. Armstrong, is if somebody else in the organization of Sunkist decided that some oranges were to be sold at a price different from one that Mr. Kelly had established under this 15-B, that he couldn't do it?

A. He couldn't do it, unless he could sell Mr. Kelly on the change. Mr. Kelly had to make the decision. [244]

* * *

(Testimony of Paul S. Armstrong.)

Mr. Dixon: The plaintiff offers Plaintiff's Exhibit 4 in evidence.

Mr. Williams: We object, your Honor, to that part of the exhibit which relates to navels on the ground it is immaterial and irrelevant to any issue in this case.

The Court: Overruled. Exhibit 4 is received in evidence.

(The exhibit previously marked Plaintiff's Exhibit 4, was received in evidence.)

The Court: I take it the facts in Exhibit 4 are stipulated to and the objection is only on the ground of immateriality.

Mr. Williams: That's right, your Honor.

Mr. Dixon: May it be stipulated, counsel, that the dollar return per ton on Valencias and miscellaneous is 27.01, and navels 28.09, subject to your check?

Mr. Williams: We checked it and I have 27.02, but I will stipulate and disregard the penny.

The Court: 27.02 and what?

Mr. Dixon: 28.09.

Q. We also discussed this morning the purchase of the trade-mark Sunkist. It was shortly after that purchase was made, was it not, Mr. Armstrong, that you embarked upon an advertising program for the name Sunkist as applied to shelf products, so-called, as well as to the fresh fruit products?

A. Yes, that is correct. I might add in that connection [247] that our primary motive for buying

(Testimony of Paul S. Armstrong.)

the trade-mark was to protect our very large investment in Sunkist as applied to fresh fruit. It was defensive, but we had a secondary motive, and that was to use the well known trade-mark in promoting the sale of our process products as well. [248]

Q. At one of the meetings of the 16 member executive committee that you told us about this morning in the early part of January, 1951, appropriations were made, were they not, for an extensive advertising campaign for the Sunkist products, both fresh fruit and canned?

A. I couldn't be sure as to the dates, Mr. Dixon, but certainly an advertising campaign was arranged for.

Q. Do you recall the amount that was appropriated by the 16 member executive committee early in January of '51, for the campaign?

A. No, sir, I cannot. The records will readily show.

Mr. Dixon: It has been stipulated by and between counsel for plaintiff and the defendants that the third paragraph of the minutes of the joint executive committee of Exchange Orange and Exchange Lemon, held at Los Angeles, January 2, 1951, at the Jonathan Club—paragraph 3 of page 3—may be read into the record.

I am reading from those minutes as follows:

"The proposed appropriation for this advertising campaign is $1,250,000, Mr. Eller said, to be used principally for billboards, newspapers, radio and

(Testimony of Paul S. Armstrong.)

television, and that it is recommended that Sunkist frozen concentrate for lemonade should receive the entire appropriation. The outline of this campaign was presented in considerable [249] detail by Mr. Eller, following which Mr. Jameson said that the Lemon Board was in agreement with the plan in principle."

Q. (By Mr. Dixon): Do you recall, Mr. Armstrong, whether all of this appropriation was to be used and was used for advertising just lemonade or lemon products, frozen concentrate lemonade?

A. I can't recall that far back.

Q. You do recall, do you not, that in the year '51 an extended campaign was instituted by Sunkist to promote the Sunkist, that is, the products produced by Exchange Orange and Exchange Lemon under the Sunkist label?

A. Yes, as reflected in those minutes. [250]

Q. And this is part of that program when it got under way, is that correct? A. Yes.

Q. Now, at the meetings of the joint executive committee, I believe you testified this morning, Mr. Armstrong, Mr. Wilcox was present at those meetings usually, was he?

A. When available, yes.

Q. And Mr. Wilcox was the——

A. Assistant general manager of Sunkist.

Q. Is that your assistant, I mean a kind of assistant to you? A. Associate, yes.

Q. Did Mr. Wilcox have anything to do with reporting to the joint executive committee concerning

(Testimony of Paul S. Armstrong.)

the amount of product fruit that might be available for processing by Exchange Orange, Exchange Lemon, and for sale to independent processors in the year 1951?

A. Both Mr. Wilcox and I attend the joint executive committee when we are in town and can arrange to be there, more as observers and listeners, and not to make reports to anybody.

Q. Would it refresh your recollection any as to whether Mr. Wilcox made any estimate or report to such a meeting if the minutes showing such meeting and a report were shown to you?

A. Oh, surely. I might add Mr. Wilcox, among his other [251] duties, is treasurer of Sunkist, and in the treasurer's department is lodged our statistical office, so that he is looked upon as the best source of information for the crop condition and volumes, and so forth, obtained from the Government and other sources.

Q. Can you state to the jury whether as one of the duties which Mr. Wilcox performed for the 16-member executive committee, he did submit such reports to the committee?

A. Not to my recollection, not as a regular thing. It might be an occasional happening, but usually the plant managers might bring that up in connection with their reports. They would not look to Mr. Wilcox officially for it.

Mr. Dixon: It has been stipulated by and between counsel that the following portion of the minutes of a meeting of the joint executive commit-

(Testimony of Paul S. Armstrong.)

A. That is correct, f.o.b. shipping point.

Q. Now, getting back to your statement of a few moments ago that Sunkist lost money on this 18 per cent of its total volume dollar of business—was that your statement?

A. No, I didn't say Sunkist. I said the growers. Sunkist neither makes nor loses money. It operates at cost.

Q. Then I am referring to Sunkist as being the grower. Someone has to have this money.

A. No one ever has received a return for oranges from products channels that would justify planting an orange grove to grow oranges for that destination. That is because it is a salvage operation where the raw materials cost is less than the cost of producing it, and we, of course, have been very anxious to improve the distribution and sale and acceptance of these products so that the grower could get back what it cost to grow the oranges that went into them, feeling that if it didn't, it wouldn't be long until the industry itself would collapse as far as products is concerned, because you cannot long operate a business of these proportions where the cost of the basic raw material is not returned.

Q. Just how do you determine the cost of the basic raw material, Mr. Armstrong, so that you can state to this [258] jury that based upon that cost money is lost on the products end of your business?

(Testimony of Paul S. Armstrong.)

A. We take the average cost of producing oranges, which is developed by the county agricultural commissioners, who are state employees, and from that average cost there can be added the cost of picking and hauling the fruit to the packing house and the packing house expense of washing such fruit and grading it, so that you come up with a figure which represents the average for all growers in the organization as to their cost of providing product goods at the packing house ready for delivery to the cannery.

Q. I understand how you can perhaps compute a cost to the grower of all of the oranges that are grown on a particular acreage or number of acres, but I must confess, I am a little dense, I guess, at finding out how, when you once determine that total cost based upon the production cost per acre, that you can say that the grower makes money on the fresh fruit that comes from that particular acreage and loses money on the same fruit when it goes for products fruit, for process products. Can you explain that to the jury?

A. Well, I can to my satisfaction. We must start with an average cost of producing anything, and if a portion of that production can be sold at a market that pays a higher price, that represents a return over and above the average cost of production, If a portion of the crop has to be sold [259] in a market that returns less than the average cost of production, it would be my concept that that represented a

(Testimony of Paul S. Armstrong.)

* * *

Q. At these joint executive committee meetings, were the members ever advised when you were present concerning the proposed opening prices for these products that are being processed by Exchange Lemon and Exchange Orange?

A. As a part of the report of the manager of the [262] products department, I recall that the prices of some of the products that were under consideration were mentioned by such manager to the joint executive committee. [263]

Q. By the way, do you recall what products were being put out or going to be put out under the Sunkist label in 1951 in connection with this campaign?

A. My list may not be complete from memory, but I would say single strength orange juice, frozen concentrate for lemonade, frozen orange juice concentrate, and I think canned single strength lemon juice, were among the first items that were entitled to use the Sunkist trade-mark. That list has been gradually added to as the specifications were refined.

Q. But single strength orange juice, Valencia juice, was among those products, was it?

A. Yes, sir.

Q. These products which were processed by Exchange Orange and Exchange Lemon, and sold by Sunkist, were they sold in the various states of the United States? A. Yes.

(Testimony of Paul S. Armstrong.)

Q. And they were processed here in the State of California, at the various plants of Exchange Orange and Exchange Lemon? A. Yes.

Q. Now, getting back to this other question that I asked you a moment ago about the opening prices for these products, were they presented to the 16 member executive committee either for approval or as merely information to [264] them?

A. For information, along with the prevailing prices for comparable products from Florida or elsewhere.

Q. Was it necessary for this 16 member executive committee to approve these proposed opening prices for these products?

A. No, it was not.

Q. In other words, the information was just passed on to the committee for their further information, shall we say—is that correct?

A. That is correct.

Q. Who determined those prices, do you know, Mr. Armstrong?

A. Do you mean the prices of the finished products, such as you have mentioned?

Q. Yes, the opening prices that I just referred to.

A. Well, they are determined by the manager of the products department, with the approval of the plant managers respectively of Exchange Orange and Exchange Lemon, as to the products originating from those respective plants.

(Testimony of Paul S. Armstrong.)

Q. Is there any particular part of the bylaws of Sunkist, or any other committee or organization of Sunkist, which authorizes them to make their sole determination as to the opening price for such products?

A. Not that I am aware of. [265]

Q. In other words, they have entire authority to determine that price, is that correct?

A. That is correct. Although if management for long does not please the board of directors whom they serve, they don't last very long.

Q. How do you determine whether they please or displease the 16 member executive committee?

A. By your continuation in office.

Q. Was there ever any discussion, to your recollection, of the amount of Valencias that were being processed or were available for processing, at any of these meetings during the processing season?

A. I cannot specifically recall the details, but certainly it would be a most appropriate subject to be reported for information by those who had it.

Q. Mr. Finley was the manager, was he, of Exchange Orange Products? A. Yes.

Q. Or Exchange Orange? A. Yes, sir.

Q. And he attended these meetings of the 16 member executive committee, didn't he?

A. Whenever he was in the city, yes. [266]

* * *

Mr. Dixon: It is stiplated by and between counsel for the plaintiff and the defendants that the fol-

(Testimony of Paul S. Armstrong.)

lowing protion of the minutes of the meeting of the joint executive committee of the Exchange Lemon and Exchange Orange, held at the Jonathan Club in Los Angeles on July 31st, may be read into the record——

The Court: What year?

Mr. Dixon: 1951.

"Mr. Finley reported that Valencias were being received at the rate of 2,500 tons daily, with frozen concentrate facilities working at full capacity utilizing 1,850 tons per day. Stating, further, that the third vacuum pan at Ontario would be in operation during the coming week, and adding that the quality of fruit presently being received is such that that sugar must be added when used for frozen concentrated orange juice, although it is expected that unsweetened juice can be produced in the near future."

Q. (By Mr. Dixon): Do you know whether that quantity of Valencias would be a normal amount as being available for [267] processing each day during that time of the year, Mr. Armstrong?

A. It sounds reasonable in a good crop year.

Q. Well, it is a fact, is it not, that in 1951 the amount of Valencias available for processing into these by-products was in excess of what it had been in the previous year?

A. Yes, sir, we had a bad freeze in 1950, and it was a normal or above normal crop, I would say, in '51.

(Testimony of Paul S. Armstrong.)

tee held on November 7, 1950, at the Jonathan Club in Los Angeles, California, may be read into the record.

"With deference to a production program, Mr. Wilcox said that estimates had been made of tons of oranges, lemons and grapefruit that would be available for processing during the coming year, production capacity of all exchange facilities for the various products under consideration, and the proportion of the pack of each product that would be available to private label buyers," [252] end of the stipulation and insert into the record.

Q. Does that refresh your recollection any, Mr. Armstrong, as to the discussion of what amount of fruit would be available during the year 1951 as Mr. Wilcox estimated it at that time?

A. Does the record show I likewise attended the same meeting?

Q. Yes. It shows that Mr. P. S. Armstrong, Mr. F. R. Wilcox, Mr. J. A. Finley, and several others were present.

A. Well, I would accept that statement, but I don't remember it specifically. [253]

Q. Do you recall whether at this meeting there was any discussion, in which you either participated or instituted, with reference to the use of the trademark Sunkist on processed juices?

A. I do not specifically recall, but it would be a very proper subject of discussion, because the right to use Sunkist is lodged with Sunkist Growers, and I would have a very active interest in what

(Testimony of Paul S. Armstrong.)

products were under contemplation and what their specifications were.

Q. Do you recall whether there was any discussion at this meeting concerning the sales program with reference to frozen products sold or to be sold under the Sunkist label in 1951?

A. I can't recall anything, I don't think, that happened in 1951, specifically.

Q. I realize that this is putting you under some handicap, Mr. Armstrong.

A. I have what is considered to be a fairly good memory for some things, but I can't remember that much.

Q. I thought because they had just purchased——

A. It is within the realm of possibility.

Q. ——the name and were embarking on this program, that some of these things might be rather clear in your mind.

A. We certainly intended to sell products under that trade-mark, and to be sure that the products were top quality. [254] and we were going to advertise them and properly promote them, because you must remember that this business is a salvage business, this products end of the business, and we never yet have been able to get a price for the juice fruit sold to others or made by ourselves that paid the cost of production to the average grower. It is purely salvage.

Q. I am glad you brought that up. Will you tell the jury, if you can, approximately what dollar re-

(Testimony of Paul S. Armstrong.)

turn Sunkist got in 1951 from these products that we have kind of cast aside here as being unimportant?

A. I couldn't recall specifically as to dollars and cents. I thought you put that in the record this morning as to the amount per ton. I can tell you——

Q. We haven't yet.

A. ——that the cost of production per ton——

Q. No. I mean what it meant in dollars, what was the income to Sunkist, approximately. I don't expect you to remember the exact amount, but approximately, from these by-products or products of by-product fruit.

Mr. Williams: I object. On Valencias and navels, it is already in the record. It is on Exhibit 4.

Mr. Dixon: I don't think the entire amount is involved.

The Court: Overruled.

Mr. Dixon: If you recall.

The Witness: I can't recall. It is a substantial amount [255] in dollars. At times it amounts to as much as 20 per cent of our total dollar volume of business. But it is conducted at a loss so far as the grower is concerned.

Mr. Dixon: Would you read back the question and answer, Mr. Reporter?

(The record was read by the reporter.)

Q. (By Mr. Dixon): I want to go into that loss question in a moment, but first let us establish,

(Testimony of Paul S. Armstrong.)

if we can, the approximate amount of this business in dollars for the year 1951.

The Court: Have you shown that to counsel?

Mr. Dixon: This is the '51 report.

Mr. Williams: I will be glad to stipulate to what the report says.

Mr. Dixon: I was going to use it to refresh——

Mr. Williams: As long as the figures are in the report we will be glad to stipulate to them.

I take it you are talking about the second paragraph on page 5?

Mr. Dixon: That is correct.

Mr. Williams: You may read it into the record if you wish.

Mr. Dixon: This, by stipulation of counsel, may be read into the record, and it is contained in the 1951 annual report of Defendant Sunkist, and is taken from page 5: [256]

"The sales value of all fresh fruit and products sold by the Exchange was slightly in excess of $150,000,000 f.o.b. shipping point, an increase of about seven million over last year. Product sales accounted for 18 per cent of the total dollar volume as compared with 19 per cent last year."

Q. (By Mr. Dixon): In other words, this would be about 18 per cent of the total business? I am talking about all of your products.

A. Yes. That is my report. [257]

Q. And it would comprise about between 18 per cent, then, of the total dollar income to Sunkist during the year 1951?

(Testimony of Paul S. Armstrong.)

loss as related to the average cost of the product. Whether the grower on his whole operation combined makes a profit or not in a particular year depends on the proportion of his product that goes to those respective channels and the relative prices received from each.

Q. Do you want this jury to believe that from your point of view, at least, the grower would be better off if Sunkist got out of the products end of the business because it is a loss to him?

A. No, that doesn't always follow, for the same reason that the packers make by-products that they may not make a profit on, but they would make more loss if they didn't utilize it. It is a salvage as distinguished from a profitable operation, and that applies to any kind of business.

Q. I beg your pardon?

A. I believe that applies to any kind of business. We have it in our support prices for agriculture.

Q. But was are just talking about Sunkist now?

A. Yes.

Q. And its operations, and particularly the processing operation, which I understood you had stated was conducted at a loss to the grower. But assuming that it has been conducted at a loss to the grower, you have continued to do [260] so for a good many years, have you not?

A. Yes, sir.

Q. That is the primary and principal function

(Testimony of Paul S. Armstrong.)

of Exchange Products Company? A. Yes.

Q. So that as far as Exchange Products is concerned—I am sorry, as far as Exchange Orange is concerned, that is a loss and a losing operation to the grower?

A. It is as far as determining his average cost of production. Of course, they are striving all the time to develop more products, develop greater consumer acceptance of that, learn the chemistry of by-products better, so that they can get a higher return for the fruit used for that purpose.

The Court: Does the jury follow this now? Do you understand this?

Juror Johnstone: I think I understand it better than the attorney does.

Juror Weiner: It brings up the cost of the other returns, the higher quality.

The Court: It comes down to this. If all that the growers grew was products oranges, they would lose money.

The Witness: They couldn't operate.

The Court: If all they grew was fresh fruit that went to the markets, they would make more money?

The Witness: Yes. [261]

The Court: But averaged together, what they get from products and from fresh fruit, they make an X amount of money, which probably means that most of them make a little money.

The Witness: Yes, or they wouldn't stay in business.

(Testimony of Paul S. Armstrong.)

Q. I mentioned the opening prices for these products a short time ago as being submitted to the committee; do you know whether regular price lists for the products processed and sold by Sunkist in interstate commerce and in the sate of California was thereafter submitted to the 16 member joint executive committee that we have been talking about?

A. I can't recall them being submitted as a regular thing. Perhaps in connection with Mr. Thompson's report he would reflect any changes in price that had occurred that were of significant interest.

Q. It is a fact, is it not, that this committee was kept pretty well informed, at least by the four-member committee, of what was going on, was it not, in the Exchange Orange processing plants?

A. They were kept well informed, yes.

Q. So the members of the committee, including yourself, [268] would know what the prices were and when changes in prices were made for the products that were being sold by—I mean that were being processed by Exchange Orange is concerned, is that correct?

A. I am not a member of the committee.

Q. But you did attend practically all the meetings.

A. I attended all the meetings I could when I was here, and I heard those incidentally reported. But that was all.

Q. Did you ever evince any interest in the price the products were selling for?

(Testimony of Paul S. Armstrong.)

A. Surely. I was trying to get more money for the farmer every time that I could possibly do it.

Q. I am sure you were.

Now, with that interest, can you tell us what the prices generally—whether the executive committee was informed by this four-man executive committee of changes in the price of the products sold?

A. I do not know to whom you refer when you say four-man executive committee.

Q. I am referring to this other committee we talked about this morning. Yourself—it is this informal committee—I believe Mr. Finley was a member, and there were two others.

A. McMillan, Thompson, and myself, and Mr. Wilcox. [269]

The Court: Let's call that, if we can, the committee of managers. That is the name the witness gave to it.

The Witness: That committee had no official status with the joint executive committee of 16, and such reports as were made to the joint executive committee were made by the individual managers on their own behalf in their own fields. No report was made by this committee of managers to the joint executive committee on prices.

Mr. Dixon: It is stipulated by and between counsel for the plaintiff and the defendants that paragraph 13 of the minutes of the meeting of the joint executive committee of Exchange Orange and Exchange Lemon held at the Jonathan Club on Sep-

(Testimony of Paul S. Armstrong.)

tember 24, 1951, paragraph 13 thereof, may be read into the record.

"Distribution of the first edition of a new printed price list for canned goods items to be distributed to our brokers every two weeks, or more frequently if necessary, in order that our brokers may be kept fully informed as to the availability and current prices of our various canned goods items. Following examination of these new price lists Mr. A. C. Hardeson suggested that a complete set be sent as they are issued to each member of the joint executive committee, to which all concurred." [270]

May it also be stipulated that Mr. Armstrong was present at that meeting?

Mr. Williams: We will stipulate he was present. [271]

Q. (By Mr. Dixon): Did you receive any of these price lists that are referred to in this paragraph that I have just read into the record?

A. I might have, but I didn't, to my recollection. They wouldn't mean much to me. There are a whole host of different products, different sized cans, and I don't understand the language much.

Q. I believe you testified you didn't know anything about the cost of processing a ton of oranges into, say, single strength juice? A. I did.

Q. And you have never made it your business to determine that or to inquire into that phase of the business?

A. No, not except as general information. That is in Mr. Finley's bailiwick.

(Testimony of Paul S. Armstrong.)

Q. I take it that you also don't know anything about any of the contracts that Exchange Orange may have entered into with any processors in 1951?

A. No. I am not familiar with the contracts. They were never submitted to me. They were not under my jurisdiction.

Q. To your knowledge or recollection, were any such contracts ever discussed at any of the meetings of the 16 member executive committee?

A. No. I do not recollect any such discussion, because [272] contracts relating to oranges would be discussed with their own executive committee or board of directors, and with lemons, also, with their respective boards and committees, and not at the joint executive committee.

Q. Was any report ever made to the 16-member committee by the management committee or by the manager of Exchange Orange as to the return that Exchange Orange received from any processing contract entered into with independent processors?

A. Not that I can recollect.

Q. Would that be a matter of any concern to the 16-member executive committee of Exchange Orange and Exchange Lemon?

A. If you use the word concern from the standpoint of jurisdiction, I would say no.

Q. Well, aren't you interested as the general manager of Sunkist in what some of these contracts return, whether they are profitable or what they are?

(Testimony of Paul S. Armstrong.)

A. The management of Exchange Orange Products Company is not under my jurisdiction. It is a separate management reporting to the board of directors. I am interested, of course, but I do not have jurisdiction.

Q. Well, then, none of the processing contracts, if any, that were entered into by Exchange Orange with independent processors would ever be presented to the 16-member executive [273] committee for consideration or for any other reason?

A. No. That committee was concerned with sales and not production.

Q. Were you concerned with the sales of product oranges sold by Exchange Orange and the price that you, Exchange Orange, were getting for such sale?

A. Exchange Orange did not make such sales. Such sales were made by Sunkist growers, as I explained this morning, and those I was familiar with in that respect, but they were concerned, Mr. Dixon, with the sale of finished products, I should have said, rather than the raw material.

Q. If Exchange Orange, for example, ever sold any oranges, that would be outside of their jurisdiction, I take it, is that correct?

A. Unless they arranged with somebody to handle some for their account or something like that, because during 1951 all sales of oranges to other processors were made by Sunkist growers through Mr. Kelley's office.

Q. In any event, these contracts, if any, that

(Testimony of Paul S. Armstrong.)

were made with processors, independent processors, by Exchange Orange would not be matters to be submitted or discussed with the 16-member executive committee? A. That is correct.

Q. Were they discussed with anyone else in Sunkist by anyone from Exchange Orange? [274]

A. They might be as a matter of consultation, but not officially.

Q. Do you know of any occasion when any of them ever were discussed, officially or unofficially?

A. Not with me. I presume they were submitted to Exchange counsel.

Q. I take it your answer is as far as you are concerned, no?

A. They were not as far as I am concerned. I can't speak for anyone else with certainty.

Q. I presume you are at least familiar with the name of Winckler & Smith Corporation?

A. Yes.

Q. Do you know whether it processed any citrus juice products at any time while it was in operation? A. Oh, yes. I understand they did.

Q. Where did you get that information from, Mr. Armstrong?

A. Well, we knew in a general way who the companies were who were in the processing field throughout the state. There were probably a score of them, different sizes, and some came and some went, but Winckler & Smith was one of the processing companies, and I knew that to be so, located in Anaheim.

(Testimony of Paul S. Armstrong.)

Q. And I presume TreeSweet was another [275] one? A. Yes.

Q. Silzle?

A. Silzle. General Foods Corporation, MCP, Hyland Stanford, Mission—there were a great many of them.

Q. Some of these companies you have mentioned do not make single strength juice, do they?

A. That is true. Some do not.

Q. The ones that make single strength juices are —will you tell the jury which ones they are?

A. I wouldn't want to be responsible for the completeness of the list of that sort.

Q. I understand.

A. Because that is not in my field.

Q. To the best of your recollection.

A. I have an impression TreeSweet was the principle one, Case & Swayne, Winckler & Smith—this is single juice only?

Q. Single juice only.

A. That's all that I recall offhand.

Q. By the way, do you know whether there are any other organizations of orange or lemon or grapefruit growers in California that might come within the same classification of organization as Sunkist? A. Yes.

Q. Can you tell the jury what the names of those [276] companies are?

A. There is another co-operative in the service of the growers known as the Mutual Orange Dis-

(Testimony of Paul S. Armstrong.)

tributors, which was organized in 1905. I remember that date because they just published their 50th anniversary brochure. They now have changed their name to Pure Gold, as we have changed ours from California Fruit Growers Exchange to Sunkist. They have adopted their trade name in their corporate name.

American National Foods is now a co-operative. It used to be a private corporation for profit under the name of American Fruit Growers.

Q. When did they organize as a so-called co-op?

A. I think subsequent to 1951. Maybe two years ago, something like that.

Q. To the best of your knowledge——

A. And then there are some small individual local associations who do their own marketing and are co-operative. Such a one is Gold Banner Association at Redlands and there are others.

Q. Their operations are purely local in nature in the sense that they dispose of their products in the immediate area?

A. No, no, no. They do a national marketing.

Q. Do they do processing, also, to your knowledge?

A. Well, Mutual Orange Distributors in 1951 had a [277] procesing plant of their own at Anaheim similar, though not as large as our plant at Ontario. American Fruit Growers had arrangements with other processors to handle fruit of that character from their organization.

(Testimony of Paul S. Armstrong.)

Q. To your knowledge, Mr. Armstrong, do you know whether any individual growers as such sell their products as individuals to either buyers of fresh fruit or to independent processors?

A. An individual grower, were they large enough, would be able to sell fruit of their own production to the fresh fruit market. I am not aware of any who are large enough to have their own processing plant. The average grower in citrus has only 16 acres, so he is rather ineffectual in operating by himself.

Q. Is it a fair statement, then, that most of the oranges, shall we say, that are sold either as fresh fruit or as products fruit are handled by or through organizations comparable to the Sunkist organization?

A. Yes, that is a fair statement, although, of course, some of those organizations would not be co-operative in character, but practically all fruit would have to be delivered to a packing house to be prepared for market, because it could not be shipped from the grove direct.

Q. I think you have mentioned one, the MOD, or Pure Gold, and another one, American National Foods, that was in [278] the category of the Sunkist organization, although the latter one wasn't in that category in 1951? A. Yes.

Q. Do you recall any others?

A. The Gold Banner Association, which is a local co-operative at Redlands that engages in national marketing.

(Testimony of Paul S. Armstrong.)

Q. Do you know anything about their product, the quantity of their product?

A. About a thousand cars a year, I would venture.

Q. In tons, approximately?

A. Well, there are 15 tons in a car. Most of their fruit would be sold on the fresh market and most of their fruit happens to be navels.

Q. And they aren't particularly good for processing purposes, are they, so far as single strength orange juice is concerned?

A. The navel orange has the peculiar property of turning bitter after canning for some reason that hasn't been fully explained, and for that reason it cannot be used for single strength juice canning except very late in the season, where that bitter principle tends to disappear. There is a theory that in seeded variety that bitter principle is lodged in the seed, whereas in the seedless variety, such as the navel, there is no place to lodge except in the tissues of the fruit, and when that is cut and extracted, you get an [279] infusion of the bitter principle in the juice.

As far as the juice is concerned, if you make it fresh at home, it is just as good juice as the Valencia juice.

Q. I think this morning we agreed that a ton of oranges, that is Valencia oranges, would produce about a hundred gallons of single strength juice, and that a soluble ton of oranges, 120 soluble content,

(Testimony of Paul S. Armstrong.)

would produce about that quantity in gallons.

The Court: I thought it was pounds.

Mr. Dixon: Pounds of soluble content, Judge. yes. It is 120 to a ton, as I understand it. Is that correct?

The Court: Your question was gallons.

Mr. Dixon: No. How many gallons a ton of fruit, that is Valencia oranges, with 120 pounds soluble content, if that is the correct term, would produce, and it is my understanding it was 100 gallons at the 120 pound soluble content, if that is the correct way of putting it.

Q. Is that correct, Mr. Armstrong?

A. As far as I recollect, that is approximately correct, although there again that is not in my field.

Q. I understand.

A. But it is true that there is about 100 gallons of juice yield from a tone of Valencia oranges that are mature. Now, as to the soluble solid content of that ton and in that 100 gallons of juice, that will vary with the maturity of [280] the fruit, the district it comes from, and many other factors. It does not affect the gallonage at all. It is like having coffee that is weak and coffee that is strong. It is no more gallons. It is the flavor.

Q. As I understood your answer this morning, the average would be about 120 pounds per ton?

A. That is correct, in the average year.

Q. For the purpose of my question, Mr. Armstrong, let's assume that a ton of Valencia oranges

(Testimony of Paul S. Armstrong.)

with 120 pounds soluble content would cost $40 and would produce 100 gallons of single strength orange juice. That would, I believe, be about 40 cents a gallon, would it not, for the cost of the juice as such without any manufacturing costs?

Mr. Williams: We will stipulate that.

Mr. Dixon: All right.

The Witness: I am glad you stipulated it. I was trying to figure it out. [281]

* * *

Q. (By Mr. Dixon): That would be about 40 cents a gallon, it has been so stipulated. Now, do you know how many gallons of single strength orange juice are in a case of 12 46-ounce cans of Valencia orange juice?

A. I do not recall. That is a technical term I do not recall.

Mr. Dixon: May it be stipulated it is four gallons point three plus?

Mr. Williams: It is 4.3125 gallons per case.

The Court: What size cans?

Mr. Dixon: Twelve 46's.

Mr. Williams: Twelve cans of 46 ounces. [282]

* * *

F. R. WILCOX

called as a witness by and on behalf of the plaintiff, under Rule 43(b) of the Federal Rules of Civil Procedure, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: F. R. Wilcox, W-i-l-c-o-x.

Direct Examination

By Mr. Dixon:

Q. Where do you reside, Mr. Wilcox?

A. San Bernardino, 1395 Waverly Road.

Q. You are associated with Sunkist, are you?

A. Yes, sir.

Q. In what office or capacity do you serve that company at the present time?

A. I am assistant general manager and treasurer.

Q. How long have you been assistant manager and treasurer? A. Approximately 16 years.

Q. Now, Mr. Wilcox, are you familiar with the 16-member executive committee of Exchange Orange and Exchange Lemon? [286]

A. Yes, generally.

Q. As treasurer, as assistant general manager of Sunkist, have you attended or do you have occasion to attend the meetings of this committee?

A. Generally when I am in town, yes, sir.

Q. Directing your attention to the year 1951—I realize that is a long time back. A. Yes.

Q. During that year do you recall whether there was any discussion at any of the meetings of the

(Testimony of F. R. Wilcox.)

committee that you attended concerning any proposed contracts entered into by Exchange Orange and any independent processor?

A. I do not recall whether there were or not.

Q. Do you recall whether the amount of Valencia oranges that would be available for processing into citrus juice products was ever discussed at any of the meetings you attended that year?

A. Yes, I think that was discussed generally.

Q. And what would be the occasion for that matter to be discused?

A. It is necessary at the beginning of each season for Sunkist to make estimates, just as it is the other organizations, of the probable supplies of fruits by the varieties that they have. That is done for various reasons. For the purposes of determining cost, the general advertising and sales programs which will be carried on. [287]

Q. Directing your attention again to the year 1951, can you state of your knowledge, or based upon anything that was discussed at meetings of the 16-member executive committee, as to whether the amount of Valencia oranges which were available for processing purposes was greater in 1951 than in the year 1950?

A. I do not recall the specific occasions when it was discussed. It was generally felt, however, that the quantity was greater that year than in 1950.

Q. Are you familiar in any way with the operations of Exchange Orange?

(Testimony of F. R. Wilcox.)

A. I have a general knowledge of some of their general operations, yes, sir.

Q. Are you familiar with any of the operations of Exchange Lemon?

A. In a general way, yes, sir.

Q. Can you state to this jury whether or not Exchange Orange ever processes any lemons for Exchange Lemon at the Exchange Orange plant?

A. Yes, they have.

Q. Does Exchange Lemon process oranges for Exchange Orange at various times of the year during the processing season, at the Exchange Lemon plant?

A. I think they have processed some, yes, sir, but I could not recall the specific instances in the case of the [288] Exchange Lemon Company. [289]

* * *

Q. Are you familiar with or acquainted with the TreeSweet Products Company in any way?

A. I know of the TreeSweet Products Company. generally, yes, sir.

Q. Can you tell the jury what products they produce, if you know?

A. As far as I know their main product is single strength juices, citrus juices, both orange, lemon, and I think some grapefruit juice.

Q. Are you familiar with the name of the Silzle Company, so-called? A. Yes, sir.

Q. And what is their business, if you know?

A. They are in the citrus processing business.

(Testimony of F. R. Wilcox.)

Their activities, as far as I know, are confined to California, and they make citrus juices from the various varieties of citrus fruits. It is possible they are in other lines. I am not sure of that. [290]

Q. Do you have any knowledge, Mr. Wilcox, of any processing arrangements of any kind that were entered into, if they were, in 1951 between Exchange Orange and either TreeSweet or Silzle?

A. Yes. I knew of the fact that there were agreements with those organizations.

Q. And from whom did you secure that information?

A. From discussions with Mr. Finley primarily.

Q. Approximately when did you first learn about any such arrangements in 1951?

A. It is a long time ago.

Q. Approximately. I am not trying to pin you down to any particular time. A. I know that.

Q. Just was it the summer or the spring or the fall?

A. Well, I would say sometime in the spring or early summer months.

Q. Can you state to the jury what Mr. Finley said, if anything, to you about TreeSweet or Silzle?

A. No. I am afraid I can't recall the conversations.

Q. What was it about? Can you tell the jury what it was about?

A. General discussions as to the supply of fruit that would be available for processing during that season, both here and in Florida, the general sup-

(Testimony of F. R. Wilcox.)

plies of products [291] that would be available in both of the areas during the season.

Q. And in that course of that discussion did it develop that Sunkist or Exchange Orange was going to have or did have more Valencias than they could process into juice?

A. For processing during the 1951 season?

Q. Yes. A. Yes.

Q. Did Mr. Finley explain to you or discuss with you any of the details of this arrangement, if there was one, between Silzle and Exchange Orange and between TreeSweet and Exchange Orange——

A. No. Excuse me.

Q. ——concerning processing of oranges?

A. No. I would say the details were not discussed. We did discuss the general matters of the contracts, however.

Q. Can you tell the jury what that discussion was, if you recall, I mean now about the details of the contract or the arrangements that Mr. Finley discussed with you?

A. No. As I say, there was little discussion, if any, about the details of the contracts. The discussions I had generally related to the overall supplies of fruit, which logically comes under the statistical department, which is a part of the treasurer's office, the supplies generally of fruit both in California and in Arizona and the [292] Florida districts.

Q. It is a fact, is it not, that in 1951 Sunkist or Exchange Orange had more Valencias than they

(Testimony of F. R. Wilcox.)

could process through their own facilities or through the facilities of Exchange Lemon?

A. Yes, that was the situation. Of course, you have to estimate these supplies, as I am sure you are familiar with, because of two factors. First, the individual packing house or shipper has the determination as to which part of his fruit might go into the fresh market and which might go in the products market, and that is a variable depending upon the price factors and other determinations which he makes.

Secondly, of course, there can be changes in the crop during the season because of the growth of the crop or the loss of the crop that might occur through various circumstances of nature.

So these are estimates at the beginning of the season. But it was generally felt that there would be more fruit than Exchange Orange could process in 1951.

Q. Were you ever contacted by any independent processors in 1951 for the purpose of securing or entering into, either through Sunkist or Exchange Orange, any processing or other arrangements under which oranges might be secured or made available to an independent processor? [293]

A. Yes. I was contacted by a number of processors with whom we had done business and others on general matters. We discussed supplies of fruit, such things as that. Not as to the contracts.

Q. In other words, these other discussions that you had did not relate to any request for contracts

(Testimony of F. R. Wilcox.)

or the making available to those with whom you were talking of any oranges for processing?

A. Making available of oranges in some form, but it is my recollection not as to contracts.

Q. How are oranges made available to independent processors other than by buying them?

A. As Mr. Armstrong has indicated, by the actual purchase of oranges through the Sunkist organization, and then through contracts made by the Exchange Orange Company.

Q. By that you mean that the idenpendent processor may enter into a processing arrangement with Exchange Orange whereby it actually processes for Exchange Orange citrus juices to be sold by Sunkist as the marketing agent for Exchange Orange, is that correct?

Do you understand my question? It is quite a long one. I will be fair about it.

A. Well, let me answer it this way. If Exchange Orange entered into a contract where they had products processed for them, then those products would be sold by Sunkist [294] through the products department, yes, sir.

Q. So that is, then, one way in which the independent processor might have oranges made available to him, is that correct?

A. Yes, sir. [295]

Q. Of course, they could also buy the oranges from Sunkist, or anyone else that had them for sale, and process them themselves, could they?

A. Yes.

(Testimony of F. R. Wilcox.)

Q. I presume you have at least heard of the name Winckler & Smith, plaintiff in this action?

A. Yes, sir.

Q. Were you contacted by anyone from that organization in 1951 concerning the making available to that organization of oranges for processing into citrus juices, to your recollection?

A. Yes, Mr. Winckler contacted me, I don't recall whether just with respect to the purchase of fruit, but generally discussed the processing situation, yes, sir.

Q. Can you tell the jury what was said in substance? I don't expect you to remember the exact words.

A. No. I would say that we had general discussions, as you have frequently——

Q. May I interrupt for a moment? Can you fix the time about when those discussions took place?

A. No, I could not, sir.

Q. Go ahead. I am sorry to have interrupted.

A. That is all right.

I would say we had general discussions about the overall supply of fruit, the prospective markets, prospective [296] supplies that were being manufactured and being held over in the Florida market during that particular season, as we did on some other occasions.

Q. Did you ever have any conversation with anyone from Winckler & Smith concerning the making of oranges available to that company under

(Testimony of F. R. Wilcox.)

any kind of arrangement, either purchasing, or processing for the account of Sunkist?

A. My only contacts with anyone from that concern were with Mr. Winckler, and it is along the lines that I have indicated, sir.

Q. I take it, Mr. Wilcox, that you are not familiar with the manner or method whereby the selling price of the product oranges are determined by Sunkist? Or are you?

A. No, I am not, in detail. I know generally the mechanism.

Q. It has been testified by Mr. Armstrong, I am not sure whether you were here when he so testified—— A. Yes, sir, I was.

Q. ——that Mr. Kelly, I believe, had, shall we say, the only final say on the matter?

A. That is correct, yes, sir.

Q. Have you ever had any occasion to discuss the price at which Valencia oranges would be sold to independent processors, or anyone else——

A. Yes. [297]

Q. ——in the year 1951? A. Yes.

Q. Can you state to the jury what the circumstances were under which such discussion took place?

A. Generally the discussion took place in connection with the overall supply situation, the prospective outlook for citrus juices, citrus products, as it relates to the Florida inventories, the products, the general business conditions of the country, and more particularly the statistical position of our own crop.

(Testimony of F. R. Wilcox.)

Q. In any of these discussions that you had with Mr. Kelly, was the actual price at which the oranges, that is the Valencia oranges, were to be sold in 1951, discussed, as distinguished from this general discusion that you have just referred to that you had with Mr. Kelly about prices generally?

A. Yes, sir, I would say that on occasions we discussed specific prices, yes, sir.

Q. Do you know how Mr. Kelly arrived at—strike that.

Did Mr. Kelly ever discuss the price, the actual selling price ultimately determined to be the selling price at which Sunkist offered Valencia oranges to anyone in 1951? A. Yes.

Q. When did those discussions take place?

A. I would have no recollection as to the exact dates, but I would say on various occasions during the spring and [298] summer period as crop conditions developed and supplies became available and more definitely known from time to time. And as the fresh market changed in its price structure.

Q. I am sorry if I have misled you. I am referring only to product oranges, Mr. Wilcox; not fresh fruit oranges.

A. My point was that the fresh market, you see, has a direct bearing on the product fruit available. If the fresh price tends to improve, then oranges that would not normally go into the fresh market might go into the fresh market, and that automatically lessens the supply of fruit going into products.

If the converse situation is true, then the other

(Testimony of F. R. Wilcox.)

situation is true, because each individual shipper has the right of determination as to what fruit he will put into products.

Those kind of things change quite constantly during the course of a marketing season with a perishable products such as this.

The Court: Have you identified Mr. Kelly?

Who is Mr. Kelly?

The Witness: Mr. Kelly in 1951, sir, was in charge of the sales office in Los Angeles and had supervision of the sales of fruit, all fresh fruit, and that part of the orange and grapefruit crop which was not handled by the Exchange Orange Company. Mr. Kelly is now retired, your Honor.

The Court: In charge of sales of fresh fruit, but not [299] products oranges?

The Witness: Oranges which were sold to processors for processing, other than the EOP Company, yes, sir.

Q. (By Mr. Dixon): Now, you are familiar with the fact, I presume, Mr. Wilcox, that a price list is circulated to potential buyers of product oranges by Sunkist, are you not?

A. On occasions price lists were circulated, yes.

Q. It is a fact, is it not, that Sunkist have a price list at which product oranges were offered for sale and sold in 1951?

A. That was true at least a part of the time. Whether it was true all the time, or not, I cannot testify. [300]

(Testimony of F. R. Wilcox.)

Q. Well, if there were any changes made in the price lists, would you know about them?

A. Not necessarily, no, sir.

Q. Well, then, as far as you know, the price lists that were circulated by Sunkist in 1951 to potential purchasers of Valencia oranges indicated the actual selling price by Sunkist for those oranges during that year, is that correct?

A. I would say whenever there was a price list that was in effect and had not been substituted, either by word of mouth or another price list, that that was the price of the fruit, yes, sir.

Q. In other words, if there was a price list that Sunkist had just circulated or was available to purchasers of Valencia oranges during 1951, that would be the price, would it not, at which oranges would in fact be sold? A. Yes.

Mr. Williams: Your Honor, I object to this question on the ground no foundation has been laid to show the witness' knowledge.

Mr. Dixon: He has already answered the question.

The Court: Objection overruled. The question is answered. If it is repeated as a motion to strike, it is denied.

Q. (By Mr. Dixon): Now, directing your attention to Mr. Winckler of the Winckler & Smith Company in 1951, do you recall any conversation with him at that time concerning [301] the price at which oranges would be sold or made available to Winckler & Smith?

(Testimony of F. R. Wilcox.)

A. No. I had conversations with him, but, as I recall, nothing on price. I do not recall one way or the other.

Q. Mr. Wilcox, I believe you are also treasurer of Sunkist, are you? A. Yes, sir.

Q. And you were in 1951? A. Yes, sir.

Q. The figure of $7,947,218.13 is in the record in the case as being the pool return for Valencia and miscellaneous oranges to Sunkist by Exchange Orange in 1951. Are you familiar at all with that amount or figure?

A. No, I can't remember for each year that specific amount, but it sounds somewhere in the neighborhood of being correct, yes, sir.

Q. Do you know or can you tell this jury as to whether or not that figure represented the pool return to Sunkist after deducting all operation costs of Exchange Orange?

A. I would have to look at the record for that. There is such a figure, however, available. We would be glad to furnish it. May I say this? That a figure is made to Sunkist under the pool after the costs of selling and manufacturing. That does not, however, take into consideration the other costs of the packing house, that is the local [302] growers associations, and the picking costs, all of which are deducted before the farmers get their returns.

Q. Well, I appreciate that fact. What I am trying to get at, Mr. Wilcox, is, does this amount represent the net return to Sunkist by Exchange Orange for the 294,133,825 tons of Valencia Oranges that

(Testimony of F. R. Wilcox.)

were handled by Exchange Orange for Sunkist during the year 1951?

A. I can't answer whether that is the right figure or not.

Q. Well, let's assume that it is for the moment. Do you know how that figure is determined, Mr. Wilcox, and what items of manufacturing cost or depreciation of plant, if any, are taken into consideration?

The Court: What are you trying to find out? Whether this is a gross or net figure?

Mr. Dixon: Correct.

The Court: That Orange reports to Sunkist?

Mr. Dixon: Correct.

The Court: Can you tell us that?

The Witness: I cannot tell you what costs are taken out. If this amount is as here, it is the amount, sir, that is paid to Sunkist by Exchange Orange for purposes of distribution to the packing houses, less certain costs of handling and marketing and financing that must be deducted from this figure. [303]

The Court: Well, now, wait. Let's forget about the deductions after it gets into Sunkist's hands. Is this a bookkeeping transaction, or is this money actually transfered from Orange to Sunkist?

The Witness: No. Assuming this figure to be correct, sir, and I haven't checked it, if I may do that. this amount is actually paid to Sukist for distribution to the local associations.

The Court: Let's stop right there, please, now.

(Testimony of F. R. Wilcox.)

My first question is, is this money transferred from Orange to Sunkist, or is it a bookkeeping entry?

The Witness: No.

The Court: I understand they actually transferred the money. I am not inquiring what Sunkist does about it. I understand before Sunkist distributes it there are other expenses of packing house that must come out of it before the grower gets his share.

The Witness: That is correct.

The Court: Let's still look at the thing from Orange to Sunkist. Do you know whether this figure that has been reported here in Exhibit 4 is a gross or a net figure? This must be a net figure, then, that Orange transfers to Sunkist after Orange has taken out its expenses.

The Witness: That is correct.

Q. (By Mr. Dixon): In making that return, Mr. Wilcox, [304] do you know whether the deductions were made for depreciation of plant, machinery and equipment as an operating cost for processing these 294,000 tons?

A. No, I am not familiar with that.

Q. You don't know whether that was done or not? A. No, sir. [305]

* * *

SAM H. KELLY

called as a witness on behalf of the plaintiff under Rule 43(b) of the Federal Rules of Civil Procedure, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Sam H. Kelly, K-e-l-l-y.

Direct Examination

By Mr. Dixon: [312]

* * *

Q. Did you have charge of the sales of products fruit in this area, that is the Los Angeles area?

A. Yes, sir.

Q. During the period that you have mentioned, 1944, up until the time you retired in 1953?

A. That is correct.

Q. So that the sales of any product Valencia oranges that were made by Sunkist during that period of time would have been under your supervision in the area of Los Angeles that you have referred to? A. That is correct.

Q. Did Sunkist put out any price list to its customers for purchases of Valencia product oranges during the years that you were supervising or in charge of the sales of product oranges in this area?

A. For a period, and I can't remember the starting and stopping dates; we did for a while but I don't remember the dates.

Q. Maybe I can shorten it. Directing your attention to the years 1950 and 1951, did Sunkist put out

(Testimony of Sam H. Kelly.)

a price list to the trade, so to speak, on products oranges during those [316] years?

A. I am not sure whether that was the case in those years or not, Mr. Dixon. Most of it was done by telephone, and I don't remember in those particular years whether we mailed a price list or whether it was a simple so much a tone. I am not sure as to that for those years. [317]

* * *

Mr. Dixon: Exhibit 5 offered in evidence.

Mr. Hurd: No objection.

The Court: Exhibit 5 received in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 5, was received in evidence.)

Q. (By Mr. Dixon): Mr. Kelly, I will hand you what has been marked Plaintiff's Exhibit 5 and ask you to state, if you can, what that is?

A. It is very evidently a price list mailed out by my office over my name.

Q. Can you tell what year that price list bears or what date it bears? A. April 12, 1951.

Q. Will you refer please to the second sheet of Plaintiff's Exhibit 5, and what date does that bear?

A. April 4, 1951.

Q. Now, does that refresh your recollection as to what that exhibit is?

A. This is a price list worked out on solids basis.

The Court: Keep your voice up, please, so that counsel [318] and the jury can hear you.

The Witness: This is a price list on products Valencias, one dated April 4, 1951.

(Testimony of Sam H. Kelly.)

Mr. Dixon: Can you hear back there?

Juror Daiker: Yes.

Q. (By Mr. Dixon): Mr. Kelly, if you can, speak up just a little louder so that the juror at the far end of the jury box can hear your testimony.

A. Yes.

Q. I am sure it will be appreciated.

Were any other price lists put out by Sunkist for Valencia product oranges during the year 1951, to your knowledge, Mr. Kelly, other than Plaintiff's Exhibit 5? A. I think we only put out one.

Q. Plaintiff's Exhibit 5, then, is the price list under which Valencia oranges were offered to the processors or other buyers of by-product Valencia oranges during that 1951 season?

A. Yes, that is correct.

Q. I take it from your testimony and what I have heard from the other witnesses, that you were in charge of the sales of all the product oranges, that is Valencia oranges, in particular, in the Los Angeles area; that is true, isn't it?

A. That is correct.

Q. Did you determine the price list, I mean the prices [319] set forth in Plaintiff's Exhibit 5, before they were put into printed form, Plaintiff's Exhibit 5?

A. Yes, sir, that was my responsibility.

Q. I am sorry?

A. That was my responsibility. [320]

Q. In other words, that was your job, was it?

A. Yes, one of them.

(Testimony of Sam H. Kelly.)

Q. I know you had many of them, but this was one of them that required some time. Can you state to the jury how you arrived at the prices set forth in Plaintiff's Exhibit 5, or how those prices were determined by you? A. Yes, sir.

Q. Refer, if you will, Mr. Kelly, to Plaintiff's Exhibit 5. A. Yes, sir.

Q. I direct your attention to an item under the heading of pounds of soluble solids per ton, the figure 120. Can you state to the jury what that 120 figure means?

A. Yes. That would then translate into $40 a ton for that many soluble solids.

Q. And then under the other column, price per ton f.o.b. packing house, appears on the same line as you have indicated the figure 40, with a dollar sign in front of it. A. That is correct, sir.

Q. That indicates, does it, that the price for a ton of Valencia oranges with a soluble solids content of 120 would be $40 f.o.b. the packing house?

A. That is correct, sir.

Q. And these other figures and prices respectively represent the price per ton for oranges with various soluble [321] solids content contained in those columns, do they? A. That is correct.

Q. And Plaintiff's Exhibit 5 was the price list of Sunkist for those products, that is, Valencia oranges, during the season for 1951?

A. That is correct.

Q. Getting back to the manner of determining

(Testimony of Sam H. Kelly.)

this price and still referring to the $40 that I mentioned in the price list, can you tell the jury how you arrived at the price of $40?

A. Yes, sir. There were many factors to be considered in arriving at a price, and a certain degree or weight given to each factor, and then, also, I asked the opinion of some of the processors, some customers, as to their ideas of what prices should be.

Q. What customers do you usually contact to get that information?

A. Well, there were three major uses made of Valencia juice. One was so-called hot concentrate, which is a beverage base for an orange drink. Then there are single strength canners and frozen concentrate processors. So I would ask some of each of those different classes of processors.

In the case of hot concentrate, I would ask the customers we then had, which were Hyland Stanford, Mission Dry, and Bireley's, as well as Mr. Finley at the Exchange [322] Orange.

On single strength, I would ask the then customers, and as I remember them, they were Case & Swayne and Silzle and Mr. Finley. I think those are the only customers I had. [323]

Q. Did you ever ask anyone at TreeSweet?

A. And TreeSweet. I am sorry I overlooked that.

Q. Did you ever ask anyone at Winckler & Smith?

A. No. In 1951 I didn't consider Winckler & Smith a customer.

Q. Well, they were a potential customer, were

(Testimony of Sam H. Kelly.)

they not, of Valencia oranges, and one of the four processors, that is, the large processors so-called, of single strength Valencia juice in this area?

A. They were potential customers inasmuch as they were still in business, but that didn't necessarily mean that they would come to me for supplies, or look to me for a source of supply.

Q. I take it from your answer that the only ones, then, that you contacted that were primarily processors of single strength Valencia juice were TreeSweet, Silzle, and Case-Swayne?

A. That is correct.

Q. That you didn't contact anyone at Winckler & Smith before you made this determination——

A. No, sir.

Q. ——in 1951? A. No, I did not.

Q. Coming back to this $40 price and 120 soluble solids that we have referred to, if anyone called up and asked you what product Valencias could be purchased for, is it customary [324] in the trade to quote the price on the basis of the 120 solnble solids per ton price?

A. Yes, that is customarily done. You take that price, that is, that number of soluble solids, as being as near the average, and that would be the base price.

Q. Now, this price list, Plaintiff's Exhibit 5, do you know whether, after you had determined those prices set forth in Plaintiff's Exhibit 5, a copy of it was sent to Winckler & Smith?

A. No, sir, I really don't know.

(Testimony of Sam H. Kelly.)

Q. Well, in the ordinary course of operations of your department, and as a potential customer and a processor, and therefore a large user of Valencia product oranges, would one be sent to it?

A. It probably was. I don't know that it was or was not.

Q. Mr. Kelly, are you familiar with the 16-member executive committee of Sunkist and Exchange Lemon Products? A. No, sir.

Q. I take it from your answer that you never attended any of the meetings of that committee?

A. No, sir.

Q. And you were never called upon by any member of that committee to give any of your views concerning the price situation as it might affect processors, independent processors [325] in this market? A. No, sir.

Q. Are you a member of any other, or any committee of Sunkist? I don't mean are you, but were you? A. No, sir, I never was.

Q. Were you ever a member of any committee of Exchange Orange—— A. No, sir.

Q. ——the processing company for Sunkist?

A. No, sir.

Q. Did you ever attend any of the meetings of the executive committee of Exchange Orange?

A. I recollect one, but that was some years ago. I would guess seven, eight years ago.

Q. I assume from your answer it wasn't in 1950 or '51, in any event? A. No.

(Testimony of Sam H. Kelly.)

Q. Did you ever attend any meeting of the board of directors of Exchange Orange?

A. I think I did attend in that I sat down and listened to some of the proceedings once or twice over the years, but I don't remember the [326] years.

Q. Well, there weren't, then, I take it, probably in either 1950 or 1951?

A. Well, the only reason I would attend is if I happened to be in the building at 707 West Fifth Street and a meeting was there, why, someone might say they were having a meeting.

Q. I am sorry.

A. And then I would go in and listen for awhile.

Q. Did anyone in Exchange Orange and the executive committee or board of directors ever call you in and ask you your opinion concerning the price situation as it applied to Valencia product oranges in 1951?

A. I don't remember that any did.

Q. Did you in 1951 discuss at any time to your best recollection the price of Valencia oranges with anyone at Exchange Orange as that price might affect independent processors of single strength orange Valencia juice?

A. I probably did with Mr. Finley, but I am not sure.

Q. You say you probably did?

A. Yes. I don't remember. I talked to him frequently, so I don't remember the specific point.

Q. I am directing my attention, Mr. Kelly, solely

(Testimony of Sam H. Kelly.)

to any discussions that you might have had with Mr. Finley of Exchange Orange or anyone else at Exchange Orange concerning the price of Valencia product oranges in 1951. [327]

A. Oh, yes. I talked to Mr. Finley frequently.

Q. Can you state to the jury what the occasion would be for Mr. Finley to consult you or you to consult Mr. Finley with reference to the price of Valencia oranges sold to independent processors in 1951?

A. Well, I would ask him his opinion as to whether or not a certain price would give the processor a chance to operate at a profit.

Q. And did you have a conversation with Mr. Finley about the independent processors being able to operate at a profit under the price schedule that is Plaintiff's Exhibit 5 in 1951?

A. Oh, I am sure that I did.

Q. Can you tell the jury what that discussion was in substance? A. Well——

Q. First, may I interrupt to ask you about when the discussion took place?

A. I can't give you any dates, Mr. Dixon. I wouldn't have the slightest idea as to the dates.

Q. I can appreciate that that may be quite a few years back, but can you tell the jury whether it was, shall we say, after Plaintiff's Exhibit 5, the price list was fixed or before?

A. It would be prior to my having issued a price that [328] I would ask his opinion.

(Testimony of Sam H. Kelly.)

Q. Then these conversations were before Plaintiff's Exhibit 5 was made up by you and circulated.

A. That is correct.

Q. And after it was done, were there any discussions, to your best recollection?

A. I don't remember any specific ones.

Q. I take it, Mr. Kelly, you are not particularly familiar with the amount of product oranges, Valencia oranges, that were processed by Exchange Orange into single strength juice in 1951, are you?

A. No, I don't know how much they put up that year, but my recollection is that it was small. I may be wrong.

Q. Do you remember or can you tell this jury whether a greater amount of Valencia oranges were available for processing into citrus juice products in 1951 than in the year, say, 1950?

A. I think there was more fruit in 1951 than there was in 1950.

Q. In other words——

A. I don't remember the tonnage, Mr. Dixon.

Q. I don't expect you to do that.

A. But my recollection is that there was more, and to what degree I don't even remember that, but I am quite sure there was more in that one [329] year.

Q. Now, directing your attention to TreeSweet —you know what I mean by the name, do you, Mr. Kelly? A. Yes, sir.

Q. Do you recall whether your department, that

(Testimony of Sam H. Kelly.)

is Sunkist, sold any oranges, Valencia oranges, to TreeSweet in 1951?

A. No, sir, I didn't sell them any.

Q. In other words, no Valencia oranges were sold by your department to TreeSweet in 1951?

A. No. I am sure I didn't sell them.

Q. They were one of the big customers, were they not, of Sunkist by-product Valencia oranges?

A. They would be.

Q. And they were one of the companies that you consulted with with reference to this $40 price that we discussed a few minutes ago, were they not?

A. I probably talked to them.

Q. But you are certain that no Valencia product oranges were sold to TreeSweet by Sunkist in 1951.

A. I don't remember, no.

Q. Now, directing your attention to Silzle, you know what company I am referring to, do you, Mr. Kelly? A. Yes, sir.

Q. Do you know whether any product Valencia oranges were sold by Sunkist to Silzle in [330] 1951? A. Yes, I sold them some.

Q. Do you remember the approximate amounts?

A. No. I think it was a small amount, Mr. Dixon.

Q. And were those purchases made, to the best of your recollection, early in the canning season?

A. Yes.

Q. And do you recall whether after the canning season really got under way in volume and the Valencia crop was in, whether you made any further sales of Valencia product oranges to Silzle?

(Testimony of Sam H. Kelly.)

A. I don't think we made any.

Q. Well, Silzle was also one of these companies to which you went for help in determining this $40 price, was it? A. That is correct. [331]

Q. Do you know of your own knowledge whether they did process or produce and sell any single strength Valencia orange juice in 1951?

A. Oh, yes, yes.

Q. Do you know where they got the oranges to process?

A. Yes, sir. I know where they got some of them.

Q. Can you tell us?

A. Through Mr. Finley.

Q. Of Exchange Orange Products?

A. Correct.

Q. Do you know whether TreeSweet processed any single strength orange juice and sold it in 1951?

A. Yes, they did.

Q. And do you know where they got the oranges?

A. From the same source.

* * *

Q. (By Mr. Dixon): Mr. Kelly, would you tell the jury, please, what the procedure was that was followed by your division or office when a purchase of oranges was made by anyone, whether it was a processor or someone who wanted to buy it to squeeze into orange juice to sell, just the general procedure. [332]

A. The routine of how an order was handled?

Q. Yes.

(Testimony of Sam H. Kelly.)

A. Well, the processors usually did not purchase a single lot of fruit, they would buy or indicate the latter part of one week or the first part of the succeeding week how many tons they wanted for the week, and that divided into so many tons per day. So when the order would come in to the man in my office who handled it, then he, in turn, would contact a group of men we had in the country, that is in producing areas, who would then tell him, the man in my office, at what packing house the fruit would be available. Then, in turn, either this man in the country would contact the customer's trucker who did the hauling, or my office in Los Angeles would contact the trucker and tell them where the fruit would be available and at what time of day.

Q. Can you tell the jury how that delivery or order would be billed, that is to say, would it be based upon the price list, Plaintiff's Exhibit No. 5 that we have talked about?

A. Well, a sample was taken by the customer as he ran the fruit, and then we had a truck that each day called on each processor to pick up these samples, representing about 25 pounds of fruit, which was hauled to Ontario. And there was a laboratory at Ontario who analyzed the fruit, and from that analysis then the billing was done at my office.

Q. In other words, if the analysis showed 120 soluble [333] solids per ton, then the customer would be billed at $40? A. Yes.

Q. F.o.b. the place of shipment?

A. That is correct.

(Testimony of Sam H. Kelly.)

Q. In other words, in addition to the $40 price the buyer would pay the trucking charge to the plant, or wherever the oranges were to be delivered, is that correct? A. Yes, sir, that is correct.

The Court: By the same token, if the sample showed 150 pounds of soluble material, then the customer was billed upon the price list?

The Witness: Yes.

The Court: Or if it showed a low count of solubles, then he paid a lower price?

The Witness: That is correct.

The Court: With the forty being sort of the base?

The Witness: Yes, sir.

Well, the reason for the base, your Honor, was that that was about the average, it was 120. A lot of it would be much under that, and some of it would be considerably higher. [334]

* * *

Q. (By Mr. Dixon): Now, directing your attention, Mr. Kelly, to what has been marked as Plaintiff's Exhibit 7, can you state to the jury what that is or what those three papers attached thereto are?

A. Well, this seems to list—this one seems to list a pick-up of——

Q. By "this" you mean the top one?

A. Yes.

Q. Dated June 15, 1951?

A. Yes. It has a load number and variety and

(Testimony of Sam H. Kelly.)

weight, and a weight certificate number, driver's name, and an OAC date and where it was picked up, and then the amount of soluble solids, and that is extended out into dollars and also gallons.

By the way, I never saw one of these forms. That is apparently one of mine, but I never saw one before.

Q. Directing your attention, Mr. Kelly, to the column in Plaintiff's Exhibit 7 for identification, a rate per ton, I notice that the solids is 123 in the preceding column, but [335] I find two figures. 1,268 gallons and $342.36. Can you explain that to the jury?

A. I don't know the reason for that.

Q. Directing your attention, also, to the second sheet of Plaintiff's Exhibit 7, dated June 14, we find the same thing, 2,136 gallons and $576.72. Can you explain the reason for the gallonage there?

A. I don't know whether that figure was placed in there at the same time this dollars extension was made or whether it was made afterwards.

Q. I see. A. I don't really know.

Q. And the same question with reference to the one dated June 12, 1951, in Plaintiff's Exhibit 7 for identification.

A. They all seem to be the same.

The Court: What does OAC mean? You have OAC date and OAC number.

The Witness: That was the Orange Administrative Committee number, the committee that dealt with setting prorates for the fresh fruit market.

(Testimony of Sam H. Kelly.)

Q. (By Mr. Dixon): Mr. Kelly, from your knowledge of the manner and method in which these deliveries made to buyers were handled, do you have any explanation for the gallonage figures appearing upon these three documents? [336]

A. Well, we billed to the Silzle Corporation a certain number of gallons—I mean it was reduced to gallons, on a price per gallon. I think the number of tons involved was about 72, as I remember it.

Q. You mean that you sell oranges, Valencia oranges, to the trade and bill them on a gallonage basis? A. No.

Mr. Hurd: If the Court please, I should perhaps——

Mr. Dixon: I am just asking——

The Court: Just a minute, Mr. Dixon.

Mr. Dixon: I am sorry.

Mr. Hurd: ——make an objection to this line of inquiry. If I understand what this particular exhibit is, it is a sort of flyspeck and not worth much time, but if I am correct, this is an incident when a small tonnage was apparently sold on a gallonage rather than an tonnage basis. I don't know what the purpose is of the inquiry regarding it. If it is for the purpose of showing any discrimination as against the plaintiff, I will object to it. It is beyond the scope of the plaintiff's complaint. If it is just a matter of general history, I don't care. It is a very minor incident, in any event. Depending on the purpose, I would make an objection.

The Court: The objection is overruled. Counsel's

(Testimony of Sam H. Kelly.)

statements in objection are not evidence. I don't know and you don't know whether this is a minor matter or not. That will [337] be a question for the jury to decide under the proper instructions of the Court.—

* * *

Q. (By Mr. Dixon): Mr. Kelly, I am going to hand you what has been marked Plaintiff's Exhibit 6 for identification, the same purporting to refer to the E. A. Silzle Corporation, Anaheim, California, and direct your attention in particular to some documents contained in said exhibit dated commencing June 27, 1951, and running through to August 4, 1951. I just ask you to look at that, Mr. Kelly.

A. Yes.

Q. I ask you to refer particularly to a document that is part of that exhibit dated June 27, 1951, and direct your attention to the column Solids, which contains a figure 123 and a column headed Rate Per Ton, which has the price $41.15 in it, apparently in lead pencil, which has apparently been crossed out, and then a $35 figure in blue pencil in the margin of the document dated June 27, 1951.

Can you explain to the jury why this figure $41.15 is—strike that.

Do you know what the figure $41.15, which has been taken out in pencil or marked out in pencil is?

A. Well, that is apparently the price for 123 pounds of soluble solids, if you refer to that schedule.

Q. Yes. A. I think that is about right.

(Testimony of Sam H. Kelly.)

Q. The jury still has it, I think, but I think that is correct. A. Yes. [339]

Q. Do you have any explanation for the 35, apparently dollar figure in blue pencil that is in the margin of that document, June 27, 1951?

A. I am sorry I can't, Mr. Dixon. I don't know whose figures or what it represents. This gallons, if this will be helpful to you, I think it was 72 tons that were sold to Silzle and billed on a gallons basis, for the reason that at that time they were quite concerned over competition on single strength juice from Case-Swayne, and this was a small amount billed at that gallons price.

Q. Was Case-Swayne also buying oranges from Sunkist at the same time, namely June 15, 1951?

A. No, sir.

Q. Had they bought any oranges from Sunkist, to your recollection, prior to that date in 1951?

A. In that particular year?

Q. In 1951, yes.

A. I don't think so. I don't remember any.

Q. Now, coming back to Plaintiff's Exhibit 6 again, I will ask you to look at the various documents numbered therein, commencing June 27th, '51, and running to August 6th, '51. I notice that the ones up to and including the one dated August 4, '51, contains the rate per ton which has been crossed out in many of the exhibits or documents, and in some instances different prices apparently placed on the margin of [340] the particular exhibits in which that appears. Do you have any explanation or the

(Testimony of Sam H. Kelly.)

reason for marking out in pencil the items the rate per ton in those exhibits?

A. Only this: That this is apparently the work of some clerk in the office, and these apparently were listed and extended as routine, and from that an invoice would be made, and if no invoice was made, then it was merely a record of where the fruit went.

Q. Do you mean that no invoice was sent for these deliveries where the price had been taken out or marked out by pencil?

A. I assume so. I don't know the routine in my office as to making out invoices, but I would assume that is true, that up to some point it was extended and recorded, and then was not invoiced, I would assume that to be true. As I said before, I have personally never seen these forms until recently.

Q. Well, if any changes were made on the prices or arrangements under which these oranges were delivered to Silzle, would you be advised of that, Mr. Kelly? A. Yes.

Q. And were you ever advised by anyone of any change of arrangements that would explain why these rate per ton figures have been taken off of these exhibits?

A. Yes, I am sure that was at the time Mr. Finley made [341] a contract with——

Q. At what time?

A. At the time of these, I assume, if they were never invoiced, then the fruit would have been delivered to the Silzle Corporation, and in our rec-

(Testimony of Sam H. Kelly.)

ords it would have been charged to Exchange Orange, that is, delivered to or made available to Silzle Corporation for the account of Exchange Orange, just so we recorded where all the fruit went.

Q. I notice that the balance of these exhibits, commencing August 6th, '51, and running through to November 7, '51, do not contain any items in the column Rate Per Ton. Is it your recollection that you were advised by Mr. Finley on or about the date at which these changes commenced, namely August 6th, that there was some other arrangement with Silzle?

A. I am sure that is true.

Q. And that someone, or Mr. Finley, advised you to apply that arrangement back to these other invoices dated, commencing June 27th, '51, and ending August 5th, '51?

A. I am sure that is so.

Q. Is that your recollection of the explanation for this, Mr. Kelly?

A. Mr. Finley asked me to make available to the Silzle Corporation a given number of tons of fruit.

Mr. Dixon: Just a minute. Plaintiff will offer in evidence Exhibits 6 and 7. [342]

Mr. Hurd: I don't object on the ground of authenticity, but for the record, if the Court please, I would like to record an objection as to materiality, as being outside of the claims, or basing any claim on it as being barred by the statute.

The Court: These forms, Exhibits 6 and 7, are your forms, that is Sunkist forms?

(Testimony of Sam H. Kelly.)

The Witness: That is correct.

The Court: They are not Orange Products forms?

The Witness: No. They were from my office.

As I have said, your Honor, I didn't follow the routine of the bookkeeping and records in the office, and I personally had never seen that particular form.

The Court: You probably had more to do than that.

The Witness: But I am sure they came from my office.

Mr. Dixon: Your Honor, maybe I forgot to further identify those.

Q. (By Mr. Dixon): Those are the delivery forms, are they not?

A. Yes, sir. They would show where the fruit was picked up and the dates, and quantities.

The Court: They are the type of form from which ordinarily your invoices would be made up?

The Witness: Would be made up. That would be probably the first recording in my office as to the transaction, that [343] is the fruit itself, where it was picked up, and the quantity, and so forth.

The Court: In this particular case, as to at least certain of them, invoices were not made up, but because of this arrangement you had with Finley it was taken care of in some other way?

The Witness: That is correct.

The Court: In reference to the objection, you

(Testimony of Sam H. Kelly.)

are not relying on these specifically under the Robinson-Patman?

Mr. Dixon: No.

The Court: The objection is then overruled. They are clearly admissible as part of the plaintiff's general case. They certainly bear on intent.

Exhibits 6 and 7 will be received in evidence.

(The exhibits referred to, marked Plaintiff's Exhibits 6 and 7 were received in evidence.)

Q. (By Mr. Dixon): I have one further question concerning those exhibits, Mr. Kelly. They also show the delivery, do they not, of the tonnage specified therein to Silzle? A. Yes, sir.

The Court: Well, it's time for a recess. As this case goes along, I am going to try from time to time to give you some oral instructions, which I think is proper.

I want to talk to you a minute now on objections and the Court's rulings. You are the sole judges of the facts. It is not my job to decide any facts in this case. It is my job to give you the law eventually for your decision. So during the course of the trial, counsel will object, as they have a right to do and as they should do in duty to their clients, either to preserve some theory that they have in the case, or to present to the Court some legal question about the matter, and the Court rules on those objections.

When I rule on an objection concerning the admission of evidence, all my ruling means is that the

(Testimony of Sam H. Kelly.)

matter is then available to you for consideration. By ruling on the admission of the evidence, I don't indicate that I believe the witness or disbelieve the witness. I don't indicate how this particular bit of evidence fits into the picture. I don't indicate what you are going to find from it or not find from it. In other words, the judge's function in ruling on evidence is to sort out that material which you are entitled to [345] consider and that material which you are not entitled to consider. That is the extent of my function. Once it is admitted in evidence, then it is available to you for consideration and for fitting it in, if possible, with the other evidence in the case, because you must go over all the evidence, and for the purpose of drawing your final conclusions, for the purpose of drawing those inferences you are entitled to draw from evidence received.

But I put no stamp of approval on evidence when I admit it. It just like when the witness is asked a question and there is some objection made to the question and I overrule the objection. That doesn't mean I believe the witness or disbelieve him. It merely means that you are entitled to consider the evidence.

Do you follow me on that?

We will have this come up time and time again, and I think you are entitled to have a general instruction as to the function of the Court in ruling on objections to evidence.

Any objection to that?

Mr. Hurd: It was excellent, Judge.

(Testimony of Sam H. Kelly.)

The Court: Mr. Dixon?

Mr. Dixon: No, your Honor.

The Court: We will take a short recess. Remember the admonition of the Court. [346]

* * *

Q. (By Mr. Dixon): Mr. Kelly, apart from the conversation that you had with Mr. Finley of Exchange Products concerning some arrangement with Silzle, do you have any knowledge of any arrangement with Silzle for the securing of fruit from Sunkist for processing into single strength juice in 1951?

A. I don't think I understand your question, Mr. Dixon.

Q. I will try to simplify it. I realize it is a little long. [347]

Do you have any knowledge concerning the arrangement, if any, whereby Silzle was to secure oranges from Sunkist for processing into single strength juice in 1951?

A. No, sir, I didn't know the basis.

Q. Do you have any knowledge concerning any arrangement with TreeSweet whereby TreeSweet secured product Valencia oranges from Sunkist for processing into single strength orange juice in 1951?

A. No, sir.

Q. I believe you mentioned that Sunkist did sell Valencia oranges from time to time to Winckler & Smith, that is the plaintiff in this action, is that a

(Testimony of Sam H. Kelly.)

fact? A. Yes, sir. [348]

* * *

Q. (By Mr. Dixon): Now, directing your attention to 1951, did you have any conversation, to your recollection, with Mr. Winckler of Winckler & Smith concerning the securing of oranges, Valencia oranges, for the purpose of processing those oranges into single strength Valencia orange juice?

A. No. I don't think Mr. Winckler contacted us to buy fruit in 1951. He did call up to ask prices, but he didn't evidence any desire to purchase.

Q. Did you have any conversation at all with Mr. Winckler in 1951 to your recollection concerning the securing of some arrangement, if possible, with Sunkist, whereby Valencia oranges might be secured for the purpose of processing them into single strength Valencia orange juice?

A. I don't remember that I did, Mr. Dixon. I may or may not. But if he did ask me, I would be obliged to refer him to Mr. Finley.

The Court: By-products fruit?

The Witness: No. I thought his question was that he was to get fruit other than on a purchase basis. [349]

The Court: Oh.

The Witness: Is that correct, Mr. Dixon?

Mr. Dixon: That is correct, yes.

Q. Did you ever have any conversation with Mr. Finley of Exchange Orange concerning the prices

(Testimony of Sam H. Kelly.)

at which Winckler & Smith sold their Valencia orange juice?

A. No, sir. I don't remember any.

Q. Did you ever have any conversation of any kind with Mr. Finley of Exchange Orange Products concerning the underselling of Sunkist by Winckler & Smith as to price in the Valencia orange juice market?

A. I probably did, Mr. Dixon. From time to time other processors would complain to me or state to me that Mr. Winckler was selling at a price less than they were quoting. I don't recall whether that was 1951 or not.

Q. Was TreeSweet one of those who complained to you?

A. I don't remember whether they were or not.

Q. Was Silzle one that complained to you?

A. I don't remember, Mr. Dixon.

Q. Well, Mr. Kelly——

A. I don't remember the years.

Q. I understand that.

A. That was over a period of years.

Q. All you remember is that some sellers or processors of single strength Valencia orange juice complained to you [350] about Winckler & Smith selling below their price, is that correct?

A. Yes. From time to time processors did complain that one or the other was selling for less.

Q. Was there ever any question in your mind concerning the ability of Winckler & Smith to pay for any oranges, Valencia oranges, that they pur-

(Testimony of Sam H. Kelly.)

chased from you at any time? A. Yes, sir.

Q. When was that question raised in your mind?

A. I think it was late in 1947.

Q. That was during a period when Winckler & Smith were in reorganization, so-called, under Chapter 11? A. No. That preceded that.

Q. That was preceding that? A. Yes, sir.

Q. Let me ask you this question, Mr. Kelly: Did Sunkist ever lose a dime on any Valencia product fruit that it sold to Winckler & Smith at any time?

A. No, sir.

Q. To your knowledge?

A. No, sir, it did not.

Mr. Dixon: That is all. Thank you.

Mr. Hurd: If the Court please, I have a few questions that I would like to ask.

Cross-Examination

By Mr. Hurd:

Q. Mr. Kelly, I believe you testified that in setting the opening price for the products fruit that you expected to sell in 1951 you gave consideration to a number of factors. [352] I don't believe you stated what those factors were. I wonder if you would tell us what the factors were that you took into consideration in reaching this price of $40 a ton for 120 soluble solids?

A. Well, the factors were the inventories in Florida of canned juice and the rate of its sale, and the potential crop in California and an estimate

(Testimony of Sam H. Kelly.)

of the crop oncoming in Florida, and what the fresh fruit market would be as to what quantity it would absorb, meaning that products would get more or less according to whether the fresh fruit took more or less.

In crop estimates, they were really guesses. I think they were fairly accurate as to the number of fruits on the tree, but the estimates were made in boxes, and that allowed for a rate of growth. And if the rate of growth was less than anticipated, that meant an out-turn of less boxes or less gallons, or less tons. If the rate of growth exceeded this estimate, then the out-turn was no more fruits, individually, but was a gerater number of boxes and a greater number by any yardstick, either gallons or tons.

So these estimates, the out-turn, you never knew whether it would be close to it or not. And merchantability of fruit was not known. That is, during the growing season it was never known how prevalent crystalization would develop, or withered ends and splits, and other defects would develop. [353] So you would start with a given estimated number, but you never knew whether it would turn out to be that or not. [354]

* * *

Q. (By Mr. Hurd): What bearing, Mr. Kelly, did the Florida inventory have upon the price that you would set for your products?

A. Well, Florida was the dominating factor in both single strength juice and frozen concentrate.

(Testimony of Sam H. Kelly.)

They produced far more than did California. Now, the California pack would have been over, most of it, by the time Valencias in Southern California were available. But the oncoming crop of Florida would have an impact, depending on the size of the crop and the quality, the size, and it may or may not be affected by weather conditions intervening, hurricanes, or anything bearing on the quality of the fruit that would affect—well, the time of maturity, too, as to when it would be available.

Q. Is there any relationship between the price of Florida product and the price of California product?

Mr. Dixon: I object to that question, your Honor. I think it obviously calls for a conclusion of this witness.

Mr. Hurd: Well, I should say what, if any, relationship was there? I don't expect a conclusion, but I would like you to explain if there is any. [355]

The Court: Talking about price of fresh fruit or products fruit?

Mr. Hurd: Talking about products fruit. The price Florida is charging for their inventory as bearing upon the price that California might expect from the product it put up.

Mr. Dixon: If the Court please, as I understand the question, it is directed to the determination of price of product fruit, Valencia oranges sold here by Sunkist in California. I can see no connection between the price of product fruit sold here in Cali-

(Testimony of Sam H. Kelly.)

fornia and the price of product fruit in Florida. They are not in competition with each other.

The Court: Overruled. We will find out. Was there a relationship?

The Witness: Well, the price of products fruit in Florida partly determined the price of the finished product. Hence it would be competitive with the finished product as put up in California.

The Court: Let me ask you this. Product fruit from Florida, was that ever shipped out here to these processors in California?

The Witness: Oh, no.

The Court: They couldn't ship it?

The Witness: No. [356]

The Court: So processors here in California, like the ones you have mentioned, TreeSweet and Silzle, were dependent upon products fruit in California?

The Witness: That is correct.

Q. (By Mr. Hurd): Now, what, if anything, was the relationship between the price being charged for the finished product of Florida fruit in this area and the price that would be charged for the finished product of California fruit that you would pack?

A. One was directly competitive with the other, that is, California juice would have to sell in some relationship to that of Florida. Now, I think California juice usually sold for slightly more than Florida juice, but then you get into the question of freight rates. If the California juice—the farther

(Testimony of Sam H. Kelly.)

you would go east, the more it would cost because of the freight differentials, and coming west, the same would be true of Florida. But one had an effect on the other. One was influenced, each was influenced by the other.

Q. Do you know approximately what percentage of the single strength juice as sold in this area in 1951 was from Florida and what percentage from California?

A. No, sir, I don't know.

Q. Do you recall whether or not you gave any consideration to what was being charged for the products, single strength and frozen concentrate, made out of Florida oranges [357] when you set your $40 price in 1951?

A. Yes. It is my recollection that in 1951 the price of Florida single strength juice advanced over a series of months, January, February, March, and I think April—I am not sure about April, but it did advance in January and February and March, I am quite sure. Now, I don't know the conversion tables, I can't tell you, I don't even remember the selling price of California juice or Florida juice at that time as to dozens or cases, but what Florida was selling at would determine the price that I would arrive at to permit a processor in California to sell, make the product and sell it.

Q. You have referred to there being the three types of orange juice products, the hot concentrate, single strength and frozen concentrate. Are those customarily made in this are at the same time?

(Testimony of Sam H. Kelly.)

A. No. The first processors buying fruit each year were the hot concentarte people, and some years some single strength canners would put up some juice sweetened.

The Court: You mean they would have to add sugar?

The Witness: Add sugar. Then other processors of single strength would wait until the fruit, they thought, had reached a better standard of maturity.

And then about that same time frozen concentrate operators would start. That was customarily the case some time in July. [358]

Q. (By Mr. Hurd): Do you recall whether there was any difference in the normal return to the processor for these various three products?

A. Yes; hot concentrate would be the lowest, and single strength would be next higher, and frozen the highest of the three.

Q. I notice that Plaintiff's Exhibit 5 is dated sometime in April, 1951. Was that before or after the beginning of the hot concentrate season?

A. Well, April, there was no Valencia oranges available for processing in April except from Central California.

Q. Prior to the beginning of the hot concentrate season, then? A. Yes, that is correct.

Q. Did you have any custom or general rule regarding changing your prices throughout the year? I notice in the testimony you said that you did not change the price in 1951. Was that a customary situation?

(Testimony of Sam H. Kelly.)

A. No, it was not. Most years, in fact all of them that I can remember, we started at a minimum price, and then as it was jutified raised the price. There would not be very many price changes during an entire season.

Q. Did you also reduce prices throughout the year? A. That is correct.

Q. Is that a customary thing? [359]

A. Late in the season we did make some sales in '51 of small amounts, but we did not reduce prices once they were established, and for this reason: that I would financially cripple processors if I reduced a price. Once they had built up an inventory, these inventories were sold, some currently, and some carried as stock and sold over a period of months, and if I reduced the price, then I would cause them to suffer a loss on all of the inventory they had on hand, and in some cases I understand they guaranteed prices against their own decline in the warehouses of wholesalers.

Q. I believe you testified that before you set this $40 price in 1951 you consulted Mr. Finley of Exchange Orange, among others; am I correct in that? A. That is correct.

Q. Do you recall whether or not Mr. Finley approved of your $40 price?

A. My recollection is that he felt that price was too high.

Q. Had Winckler & Smith been a substantial customer of yours for products oranges in 1950?

A. I don't think so.

(Testimony of Sam H. Kelly.)

Q. What about '49?

A. I don't think in '49 either.

Q. You said you didn't consult him regarding the $40 price. Did you have any reason in your own mind for not [360] consulting him in 1951?

A. I didn't consider him a customer in that year.

Q. You consult only customers, customarily?

A. That's right.

* * *

Q. (By Mr. Hurd): With reference to your questioning Winckler's ability to pay, when did that occur?

A. As I remember, late in 1947, they were slow in meeting their payments.

Q. What, if anything, did you do about it? [361]

A. So we asked them why. And their answer was that they didn't have the money at the time.

Mr. Dixon: If the Court please, I object to the general statements here. The witness has referred to Winckler, the plaintiff here as Winckler & Smith. If he is referring to conversations with the president of Winckler & Smith, I think it ought to be specified. I object on the grounds of generality of the question.

Mr. Hurd: I will try to clear that up, if I may, your Honor.

The Court: All right.

Q. (By Mr. Hurd): You said they didn't have the money. To whom are you referring?

A. Mr. Winckler.

(Testimony of Sam H. Kelly.)

Q. And where and when was this?

Mr. Dixon: If the Court please, may I have the answer?

(The record was read by the reporter.)

The Court: That doesn't clear it up.

Who were you talking to?

The Witness: Well, it would come about this way, your Honor: The man in my office who was responsible for collections, when he couldn't make collection on terms agreed upon, then he would call it to my attention that such and such a customer could not and did not meet their agreed upon terms. [362] Then is when I would take some action.

The Court: Are you referring now to what your man in the office told you, or did you speak to Mr. Winckler?

The Witness: I talked to Mr. Winckler on a number of occasions.

Q. (By Mr. Hurd): Is this during 1947?

A. I am sure it was in 1947.

Q. Where did these conversations take place? Were they in person or over the telephone?

A. Both. Some of them were in my office and some were over the telephone.

Q. Was anyone present besides the two of you?

A. I don't remember whether there was or was not.

Q. Do you recall any specific conversation?

A. No, I can't pinpoint it as to a date.

(Testimony of Sam H. Kelly.)

Q. Do you recall the general substance of the conversation?

A. Yes. We told Mr. Winckler, or I told Mr. Winckler that our terms of sale were cash five days after date of invoice, and if he couldn't meet those terms I would have to work out some other arrangement with him. And the first arrangement was that he would pay for each day's purchases the day following. [363]

Q. The day following what?

A. The pick-up of the fruit.

Q. About when would that be?

A. Like if I sold him on a Monday, we got a check from him on Tuesday.

Q. And when did that arrangement go into operation?

A. I think that was late in 1947 or in 1948.

Q. Was that before or after his Chapter 11 bankruptcy proceeding?

A. I think this was before.

Q. You said the first arrangement. Was there another one?

A. Yes, there was one following that, where we asked Mr. Winckler——

Q. Who do you mean by "we"?

A. That is I did, ask Mr. Winckler to make a deposit with us and buy against the deposit.

Q. About when was that done?

A. I think that was in 1948.

Q. Was that before or after the Chapter 11 proceeding? A. That was before.

(Testimony of Sam H. Kelly.)

Q. Thereafter did you ever sell Mr. Winckler on open account? A. No, sir.

Mr. Hurd: That's all. [364]

Redirect Examination

By Mr. Dixon:

Q. Mr. Kelly, thereafter did you ever make any inquiry into the credit status of the plaintiff, Winckler & Smith? A. Yes, sir.

Q. When? A. Well, from 1947 on.

Q. I said thereafter? A. Yes.

Q. When thereafter?

A. Well, as a matter of fact, when he first started in business, but we asked him, or I asked him to furnish us with a financial statement.

Q. When did you ask Winckler & Smith to furnish Sunkist with a financial statement?

A. I did it on several occasions. I don't know just——

Q. Can you specifically state when?

A. No, I don't remember just what years, but he did furnish us with a financial statement on occasions. I don't know how many or what years. We also asked Dun & Bradstreet for a credit report on Winckler & Smith.

Q. Was this after the 1947 situation you have referred to? A. That is correct.

Q. How do you fix the time as being after that period [365] of time?

A. Well, I just remember the date as to the year in which he became slow in meeting his obligations.

(Testimony of Sam H. Kelly.)

Mr. Dixon: Now, if the Court please, I wish the witness would be instructed to use the term Winckler & Smith here. He has several times—I know he is a layman and doesn't understand this, perhaps, but he uses the term "he was slow," and "he didn't pay."

Q. You were doing business with Winckler & Smith, a corporation, were you not?

A. That is correct, sir.

Q. And the personal credit of Mr. Winckler was not involved in any of these sales or transactions, was it?

A. No, sir. I am sorry if I used the wrong word. I was referring to Winckler & Smith as a corporation.

Q. I just wanted to clear it up.

A. I'm sorry.

Q. Because we are talking about Winckler & Smith, Mr. Kelly. A. I know.

Q. And not Mr. Winckler, who is a stockholder of this company. A. Of course not.

Q. After 1947, did you request any credit report of Dun & Bradstreet on Winckler & Smith, the plaintiff in this [366] action? A. Yes, sir.

Q. Do you have such a report in your files at the present time? Do you know whether there is such a report? A. I think there is.

Q. Can you tell this jury about when you requested such a report? Was it in 1948, after this proceeding you have talked about?

(Testimony of Sam H. Kelly.)

A. To the best of my recollection, it would have been late in 1947 or in 1948.

Q. Did you make that request on your own of Dun & Bradstreet?

A. Those requests were made by my office to the cashier's office of Sunkist.

Q. In other words, you made the request?

A. That's right. I did not make it directly to Dun & Bradstreet.

Q. So that there would be such a report, then, in the files of Sunkist, would there not, or should there be such a report?

A. I assume there is, sir.

Q. For the year 1948? A. I assume so.

Q. Did you make any request other than the one request that you mentioned of Dun & Bradstreet for a credit report on [367] Winckler & Smith?

A. We probably did—I probably did from time to time, but I don't remember dates when I asked for them. I don't remember that. We tried to keep up currently with a current position on Winckler & Smith.

Q. Winckler & Smith did buy some Valencia oranges from Sunkist all through the years 1948, 1949, 1950, and 1951, did they not?

A. In some years—I think one year they only bought one ton.

Q. The record would show.

A. And then I think another season they only bought 20 tons. That is my recollection. But the rec-

(Testimony of Sam H. Kelly.)

ord will show. I am sure it was almost nothing in two years.

Q. But whatever was bought they paid for, did they not? A. Yes, sir.

Q. It was not a sale on a credit basis, then, is that correct?

A. No, it was not on open account.

Q. So that Sunkist never sold Winckler & Smith anything after 1947 except on a cash basis, is that correct, or by pre-payment for the purchase?

A. Well, there was a period where it was—invoices were paid the day following the pick-up of the fruit. How [368] long that continued until it was put on a purchase basis against the deposit, I don't remember those dates.

Q. So that no fruit was ever delivered to Winckler & Smith without assured payment, is that correct, while you were with Sunkist?

A. As I have stated.

Q. After 1947. Did you ever make any inquiry into the financial condition of Silzle?

A. I don't remember that I did.

Q. Did you ever make any request for a credit report concerning Silzle's financial condition?

A. I didn't make any.

Q. Did you sell them on cash or credit, do you recall? A. Open account.

Q. On open account? A. Yes.

Q. Did you ever sell any oranges to Hart's? You know what company I am referring to.

A. Yes.

(Testimony of Sam H. Kelly.)

Q. Did you sell them on open account?

A. I think so.

Q. Did you ever make any inquiry into the financial condition of Hart's? A. Yes.

Q. When did you make such an inquiry? [369]

A. I don't remember the years.

Q. Do you know whether Hart's is still in business? A. No, I do not.

Q. I take it you don't know whether they are or aren't in business? A. No, I do not.

Q. Were they in business, to the best of your recollection, when you retired in 1954—was it 1954?

The Court: 1953.

The Witness: 1953.

Q. (By Mr. Dixon): 1953?

A. Yes, I think they were.

* * *

Mr. Dixon: Plaintiff's Exhibit 8 is offered in evidence, the same being the delivery sheets, the records showing deliveries of fruit, Valencia orange products, to TreeSweet commencing July 30, 1951, and ending November 8, 1951.

Mr. Hurd: No objection.

The Court: Exhibit 8 received in evidence.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 8.)

Q. (By Mr. Dixon): Handing you, Mr. Kelly, Plaintiff's [370] Exhibit 8, I ask you to examine the same and indicate to the jury, if you will, what

(Testimony of Sam H. Kelly.)

documents are contained in that exhibit. They are all the same.

A. Is it necessary for me to go through them?

Q. Well, you suit yourself.

A. These documents show loads of fruit picked up by TreeSweet, Valencia oranges, in 1951, show the point of origin, that is the packing house, and the quantity, and the soluble solids. No extension made as to rates per ton. [371]

Q. On any of the delivery sheet records in Plaintiff's Exhibit 8? A. That is correct.

The Court: Well, that means they were not invoiced, then, at any rate per ton?

The Witness: That is correct, sir.

The Court: And were, instead, handled under some contract between Orange and——

The Witness: And TreeSweet.

That was merely my record to account for all the fruit.

Q. (By Mr. Dixon): Those records, Plaintiff's Exhibit 8, Mr. Kelly, are from your office, are they?

A. That is correct.

Q. Showing the deliveries referred to therein of the fruit mentioned therein to TreeSweet?

A. Yes, sir. I was responsible for all the fruit. so my records had to show where it went.

The Court: These are Sunkist records?

The Witness: Yes, sir.

The Court: The same as Exhibits 6 and 7?

The Witness: That is correct. [372]

* * *

(Testimony of Sam H. Kelly.)

Recross-Examination

By Mr. Hurd:

Q. Mr. Kelly, did you have any trouble collecting from Silzle at any time? A. No, sir.

Q. Did you have any trouble collecting from Hart's at any time? A. No, sir.

Q. Once you put Winckler on a cash basis did you ever take him off? A. No, sir.

Q. From your studies of the information you received regarding the financial situation of Winckler & Smith, did you ever conclude that it justified putting him back on a credit basis, or putting the company back on a credit basis?

A. No, sir. [373]

* * *

JAMES A. FINLEY

called as a witness by the plaintiff under Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: James A. Finley, F-i-n-l-e-y.

Direct Examination

By Mr. Dixon:

Q. Where do you reside, Mr. Finley?

A. 413 West Sixth Street, Ontario.

Q. And what is your present occupation?

(Testimony of James A. Finley.)

A. Manager of Exchange Orange Products Company.

Q. Are you also secretary and treasurer of that company? A. I am.

Q. And were you serving in that capacity in 1951? A. I was. [375]

Q. Are you a member of any executive committee of Exchange Orange?

A. Not a member of the executive committee. Just the manager reporting to them.

Q. Are you one of the four members of this so-called four-man management committee of Sunkist and Exchange Orange? A. Yes.

Q. Do you know what I refer to?

A. I think so.

Q. Just state to the jury, Mr. Finley, what your duties consist of. Withdraw that.

How long have you been with Exchange Orange?

A. Since 1926.

Q. And how long have you been general manager and an officer of Exchange Orange?

A. Since about October, 1946.

Q. And Exchange Orange is a 100 per cent owned or controlled subsidiary of Sunkist, is it?

A. It is 100 per cent owned by Sunkist.

Q. And what kind of business is Exchange Orange engaged in?

A. It is engaged in making products from the surplus fruit from the fresh fruit market, juices primarily, although we do make oil, dried meal,

(Testimony of James A. Finley.)

pharmaceuticals, and the full line. Anything we can make out of oranges or grapefruit. [376]

Q. And Exchange Orange operates the plant, does it, at which the citrus fruit is processed into these juices and other products?

A. It operates three plants, one at Ontario, one at Tempe, Arizona, primarily on grapefruit, and then one at Lindsay, California.

Q. The two plants here in California, are they engaged primarily in processing orange products and lemon products?

A. The plant at Ontario processes orange products and grapefruit products, very seldom lemon products, and that plant does the full line, juice and all.

The plant at Lindsay, California, is a drier and oil plant only. [377]

Q. It doesn't process any juice products?

A. No juice products.

Q. Is that what you call a No. 2 plant?

A. No. We have two plants in Ontario; we call one of them No. 1, and one No. 2. It is all on the same piece of property.

Q. And the plant at Tempe, Arizona, that processes both grapefruit and oranges, does it not?

A. Primarily grapefruit. Recently they have some oranges.

Q. Some of the grapefruit that are grown in Arizona, are they occasionally shipped in to your plant here in California for processing into grapefruit products?

(Testimony of James A. Finley.)

A. I would say not as a rule. There is one occasion or two occasions where that will happen. One is your grapefruit from Arizona comes in the winter months. Your summer grapefruit, the grapefruit around this area, comes in the summertime. If we have a particular order in the wintertime and have not the stock for it, we will go ahead and bring in some fruit, a very few tons, from Arizona for that one product.

The only other time was one year when we had a major freeze in the Phoenix area—Tempe is about 15 miles out of Phoenix—and the plant there was run over capacity, so we brought the surplus up here. But that was because [378] they did not have facilities.

Q. At your plants here, you process single-strength Valencia orange juice, do you?

A. Yes; we do.

Q. And so-called concentrated orange juice?

A. Concentrate, both what is termed here hot concentrate, a pasteurized concentrate, and the frozen.

Q. And the frozen concentrated orange juice?

A. Frozen concentrate orange juice.

Q. You do process some grapefruit into comparable grapefruit products, do you, at the plant here?

A. In the Ontario plant we process the grapefruit into concentrate. We have never gone into putting up that type of grapefruit into single strength.

(Testimony of James A. Finley.)

Q. You do process some lemons into lemon juice products, do you not?

A. The only time that we process lemons is when there is a particular product that the Exchange Lemon wants for their sales, but they do not have the equipment for it. And if the Exchange Orange has it, we will make those facilities available. If that particular product, the volume increases enough, they will put it in over there. But it is a temporary thing to do.

Q. These citrus juice products that you process at the plants that you have mentioned, particularly those here [379] in California, those are sold by Sunkist, are they?

A. Sunkist Growers products department.

Q. And you ship from your plants here such products as are sold by Sunkist to various states of the United States, do you? A. Yes; we do.

Q. And the same is true, is it, of the citrus juices that are processed at the Tempe, Arizona, plant?

A. That's right.

Q. So that Sunkist, then, is the marketing facility or agency through which the products that are processed under your supervision and control of the plant here are disposed of or sold in interstate commerce; is that correct? A. That's right.

Q. Do you get your fruit that you process at your plants here in California from someone in Sunkist or from Sunkist?

A. 100 per cent of our fruit comes from packing houses of Sunkist.

(Testimony of James A. Finley.)

Q. How do you determine how much fruit your plant can handle and will handle on a given occasion?

A. Of course I know our plant capacity, and——

Q. Let me ask you a few questions about that. It might be of some help to the jury to get a little picture of the processing operation here of these products. [380]

How many employees do you carry on your payroll during the processing season at your California plants?

A. Well, in the winter months during the navel season we have about 200. In the Valencia season, which is really our juice season, we will run up to 500, 550 employees, depending on the products which we are making. [381]

Q. And do you run around the clock, so to speak, during the canning season, that is, three shifts a day?

A. We have some operations which we run 24 hours a day, seven days a week. That doesn't mean that the entire plant is running that length of time, but some operation is going 24 hours a day.

Q. Can you process and can single-strength juice and frozen concentrate juices in your plant at the same time?

A. Yes. We can do that although one may affect the total production of the other, but we can do it.

Q. Then I take it the usual practice is to utilize the facilities of the plant to its capacity for a particular product at a particular time; is that correct?

(Testimony of James A. Finley.)

A. It depends upon what we have to sell in the going market or the request of the sales department as to what products they want to sell.

Q. How many other employees do you have on a year-around basis in your plants?

A. Well, there is probably on the salaried roll, accounting, chemists, and all, 100, 125.

Q. So that the ratio would be about one to four or five insofar as permanent personnel of an operating plant is concerned?

A. Yes; the difference between salary and hourly payroll, is the way we break it. [382]

Q. How do you determine the amount of oranges and grapefruit, lemons, that your plants herein California are going to process during a given year, or do you determine that in advance?

A. We have no control over the number of oranges ahead of time, what we are going to process. That depends upon the fresh fruit market and sizes and other factors. We are the home of that fruit which is not shipped in the fresh form, and it is literally—it is just dumped over to us and they say, "Here, handle it," and it is our responsibility to see to it that that fruit is handled and the growers get the highest possible return.

Q. In connection with that operation, does anyone in your organization estimate, say, at the beginning of the processing season or in advance of the processing season about how many tons of oranges, say, will be available to your plant for processing purposes?

(Testimony of James A. Finley.)

A. There is no one in our plant that does that.

Q. Who makes such a study, if any such is made?

A. Well, there is a government estimate that comes out usually for the Valencia season about in October. Here about a month ago there was one for this next year. That estimate is based on the growing conditions and just the estimated crop, and then as the season progresses further estimates are made. They go so far as to take the size of the oranges and [383] the growth rate each month to see how they compare with previous years. In that way, they extend it and make a guess as to the size of the oranges, as well as the number of boxes.

Q. Do you get this information yourself or do you get it from someone in your organization?

A. I get that from Mr. Wilcox of Sunkist Growers.

Q. You say you get that estimate early in the season?

A. Very early in the season.

Q. Does that also contain an estimate of the amount of fruit, that is, let us say, oranges, that will be available for outside processors during the processing season?

A. No. About all that gives is the total crop and then subtracted from that is the amount of fruit which they figure that they can sell on the fresh fruit market, and by this that is the amount that goes to products, all processors.

(Testimony of James A. Finley.)

Q. In connection with that estimate and the operation of your plant or plants, do you take into consideration that some of this fruit, so-called product fruit, again calling it oranges for our purposes, will be available to outside processors during the processing season?

A. At that time of the year, I will know just about how many tons of oranges the outside processors purchased or used the previous year, and then I will deduct that from the estimate of the tons available, and then I figure that, everything being normal, I will be responsible for that [384] amount of fruit.

Q. Do you do that or does Mr. Wilcox do it?

A. Well, I don't think it is done by any formal method. At the time he is giving me the estimate, he may say, "Well, we sold about so many tons to outside processors last year. Let's just take that off for a rough estimate." So early in the season, you can't pinpoint it.

Q. Directing your attention to the year 1951 in particular, do you recall whether there was an excess of product fruit that was available for processing purposes that exceeded the capacity of the Exchange Orange plants, processing plants here in California?

A. Yes. It was very early in the season when we realized that the amount of fruit would be greater than what Exchange Orange could handle.

Q. Do you know as a fact whether Exchange

(Testimony of James A. Finley.)

Orange processed during the year 1951 more single-strength orange juice than it did in the previous year?

A. I don't know whether it processed more than the previous year, but it was not our largest year by any means. There have been a number of years larger than '51.

Q. But you don't know whether it was larger in amount, that is tonnage or cases, than it was in the previous year, 1950?

A. No; I don't remember. It was a relatively small [385] pack compared to the last three or four or five years, I know that.

Q. Do you know whether the tonnage that was handled by your plant in 1951 for processing into single-strength orange juice was greater than it was in 1950?

A. That would be the same answer. [386]

Q. What was the answer?

A. I don't know whether it was more than it was in 1950, but the tonnage was not as great as it was in some previous years. We were primarily working with frozen concentrate.

Mr. Dixon: It has been stipulated to by counsel for the plaintiff and the defendants that the tonnage of oranges processed in single-strength orange juice in the year 1950—that is the season year—was 32,007 tons, and in the year 1951—that is the season year—it was 37,016 tons.

The Court: This is processed by Exchange Orange?

(Testimony of James A. Finley.)

Mr. Dixon: Yes.

Mr. Hurd: If the court please, perhaps I should point out this includes navels, as well as Valencias.

Mr. Dixon: Yes; it includes all oranges, because it wasn't broken down in that answer.

Q. (By Mr. Dixon): Can you state to the jury whether, to your recollection, you processed proportionately more navels in 1951 than you did in 1950? A. Greater on Valencias.

Q. They would be larger on Valencias in 1951?

A. Yes.

Q. In other words, there were more Valencia oranges available in the year 1951 for processing into orange juice products than in the previous year; is that a fair statement? [387]

A. That is correct.

Q. So that more Valencia oranges as product oranges went into orange products in '51 than in the previous year; is that a fair statement?

A. Yes; there was.

Mr. Dixon: It has been stipulated by and between counsel for the plaintiff and the defendants that the Government report records covering the production of fresh single-strength orange juice in 1951—I use that term to cover the processing season of 1951—was 2,397,000 gallons.

The Court: Is that figure for '50 or '51?

Mr. Dixon: That is for '51.

It is stipulated by and between counsel for the plaintiff and the defendants that during the year 1951 California and Arizona packed approximately

(Testimony of James A. Finley.)

1,600,000 cases of 24 2's of single-strength orange juice.

The Court: What is a 2?

Mr. Dixon: I was just going to come to that. It is a very good question. You are way ahead of me.

I presume it may be stipulated by and between counsel that a No. 2 can will include 3.375 gallons of orange juice. I mean that is in a case, I didn't mean a can.

The Witness: 24 18 ounces.

The Court: The witness said 24 18-ounce cans. What was your figure? [388]

Mr. Dixon: 3.375 gallons per case.

Is that right, counsel?

The Witness: That is approximately correct.

The Court: These stipulations are being stated by Mr. Dixon, without any concurrence in the record by the defendants. The court will assume that you agree, unless something is said to the contrary.

Mr. Hurd: That is correct. We advised him privately.

The Court: Unless I hear something to the contrary, his statement will be the stipulation.

Mr. Hurd: Yes. [389]

* * *

The Court: Received in evidence, Exhibit 9. [390]

* * *

The Court: But shouldn't this reference to tables be stricken out of this exhibit?

(Testimony of James A. Finley.)

Mr. Dixon: It is agreeable with the plaintiff that it be stricken.

Mr. Hurd: That's all right with the defense.

The Court: Or in the alternative to indicate that the tables 21 and 24 that are referred to in Exhibit 9 are in substance the stipulation just entered into on the production and packing of juice in 1951.

Mr. Hurd: That is also agreeable.

Mr. Dixon: That will cover it.

The Court: Then we will leave it as it is.

Mr. Dixon: I think we should also further add that the case figures reported there include any production for Exchange Orange by Exchange Lemon.

Mr. Hurd: That is correct. [391]

* * *

The Court: No. 10 received in evidence.

* * *

The Court: I am only in doubt about one sentence, that is the first sentence in the first paragraph. I take it that means there was no production shown here for Sunkist.

Mr. Williams: None for Sunkist. It was all for EOP.

Mr. Hurd: I think the subpoena asked for production either for EOP or for Sunkist.

The Court: Then it is a confusing sentence.

Mr. Hurd: It ought to be stricken.

The Court: May it go out, Mr. Dixon?

(Testimony of James A. Finley.)

Mr. Dixon: Yes. You mean take it all out?

The Court: That last sentence in the first paragraph.

Mr. Dixon: There was no production for Sunkist, yes, so that may go out. [392]

* * *

The Clerk: I have marked Plaintiff's Exhibit 11 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit 11 for identification.)

Mr. Dixon: Plaintiff's Exhibit 11 offered in evidence.

Mr. Hurd: If the court please, I object only to the portion of it relating to the Silzle situation.

In order to avoid interrupting on this, I wonder if it might be understood that I might have a continuing objection with respect to that Silzle contract. Your Honor ruled [393] on it, but just for the purpose of the record.

The Court: That will be the ruling of the court. You are objecting to the materiality and the relevancy of the Silzle references.

Mr. Hurd: Yes, on the ground of the statute of limitations.

The Court: Yes. And the objection is overruled, and you may have a continuing objection.

Exhibit 11 is received in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 11, was received in evidence.)

* * *

(Testimony of James A. Finley.)

The Court: I don't know that this exhibit is clear. [394] All these figures are based upon the contracts referred to under Subdivision (a)?

Mr. Dixon: That is my understanding, your Honor, yes.

Mr. Hurd: I believe that is correct. [395]

* * *

The Court: 12 received in evidence.

* * *

The Court: Well, I suppose there is going to be no dispute later on in talking about these documents, but the abbreviated way in which they are prepared would leave a lot to be desired. This says net tons processed. I take it that means the tonnage of resulting products obtained.

The Witness: Oh, no.

Mr. Dixon: No. I think, your Honor, it means the tonnage of juice product oranges that are handled by Exchange Orange during the year in question. In other words, there was also a figure here of product oranges, and there is the [396] item of 49 tons there. That figure merely indicates, as I understand it, that about 49 tons were not usable for juice purposes, is that correct?

Mr. Hurd: Something happened to [397] them.

* * *

Q. (By Mr. Dixon): Now, coming back to you again, Mr. Finley, I believe when we started to put in this statistical information you had testified that in 1951 more Valencia oranges were available for

(Testimony of James A. Finley.)

processing into juice in the industry than in previous years, is that correct?

A. That is correct.

Q. Of those that Sunkist had available to it, some of those were processed into citrus juice orange juice, were they not, by Exchange [398] Lemon?

A. In the year 1951 Exchange Lemon processed some for the account of the Exchange Orange Products.

* * *

Mr. Dixon: Plaintiff's Exhibit 13 offered in evidence.

Mr. Hurd: No objection.

The Court: Received in evidence.

(The exhibit referred to, and marked Plaintiff's Exhibit 13, was received in evidence.)

Mr. Dixon: This exhibit, ladies and gentlemen, I think this is about all we are going to put in for a little while, shows that Exchange Lemon received from Exchange Orange 9371 tons of oranges during the year 1951 to be processed into orange juice at the order of Exchange Orange; that of [399] this amount, 2587 tons were rejected as unfit for juice, and the total processed to juice was 6784 tons; and that Exchange Lemon received the sum of $96,108.98 from Exchange Orange for processing the 6784 tons.

The Court: All right.

Sometime hereafter, counsel will make the ex-

(Testimony of James A. Finley.)

hibit indicate what year and what it refers to. It doesn't on its face. It just refers to paragraph 3, which doesn't mean anything. That could be stricken out and the other information added.

You can do that later.

Mr. Dixon: All right, your Honor.

Q. (By Mr. Dixon): I believe Exchange Lemon and Exchange Orange had some arrangement between themselves whereby they processed oranges and lemons for each other into citrus juices at cost? A. We will help out each other.

Q. Do you know how these costs were determined, and what was involved in arriving at the cost per ton of processing the fruit by each company for the other?

A. Well, the two companies each have their own cost departments, and those figures are arrived at by good accounting practices, subject to the approval of auditors at the end of the year.

Q. Do you happen to know of your own knowledge, for example, when Exchange Orange would process some lemons for [400] Exchange Lemon, what elements were taken into consideration by Exchange Orange in arriving at the charge that was made to Exchange Lemon for that processing?

A. We would charge actual costs.

Q. That is what I am trying to find out. How did you arrive at the cost? Did you just include the labor involved in processing those?

A. Cost is labor, steam, electricity, depreciation, supervision, proper share of administration, and

(Testimony of James A. Finley.)

all costs up to the time that the material is turned over to Exchange Lemon, the freight involved is at Corona, if we sent it over there with our trucks they are charged for that. But it is actual [401] costs.

Q. And did it include the cost of cans used by Exchange Lemon, do you know, Mr. Finley?

A. That is worked differently. Are you talking about that one particular year? Or any year?

* * *

Mr. Dixon: Plaintiff's Exhibit No. 14 is offered in evidence.

Mr. Hurd: No objection.

The Court: Exhibit 14 is received in evidence.

* * *

Q. (By Mr. Dixon): Mr. Finley, I will hand you Plaintiff's Exhibit 14 and ask you if that exhibit constitutes the billing received by Exchange Orange for the processing of oranges during the year 1951 by Exchange Lemon?

A. As far as I know, that is.

Q. Do the many marks or notes on those bills or invoices indicate anything to you particularly?

A. Nothing in particular. It is done in the accounting department. This is the first I have seen of them. [402]

Q. I take it, then, that you are yourself not personally familiar with the items or the manner or method in which the amounts set forth in Plaintiff's Exhibit 14 were arrived at, is that correct?

(Testimony of James A. Finley.)

A. I know they are arrived at on a cost basis. I am not an accountant.

Q. Can you tell this jury of your own knowledge what cost factors were considered by either Exchange Orange or Exchange Lemon in arriving at the charge made in Exhibit 14 to Exchange Orange by Exchange Lemon?

A. Those are the actual costs, supposed to be, as represented to me, the actual costs of producing that material for the account of Exchange Orange Products Company by their accounting procedures.

Q. Now, Mr. Finley, can you tell the jury who determines the prices that are to be charged by Sunkist for the citrus juice products that are processed by Exchange Orange and turned over to Sunkist for sale?

A. The Sunkist Growers Products Department, which is a sales organization for the Exchange Orange Products and Exchange Lemon Products, recommends in the case of oranges and in the case of grapefruit to the manager, which is me, and in the case of lemons to the manager of Exchange Lemon Products, what they think they can get for certain products. It is up to the managers of the two respective plants individually, [403] depending upon variety, to set the final price, either concur in it or change it, or tell them what we want for it.

Q. By the management committee——

A. Not the management committee, no. The managers.

(Testimony of James A. Finley.)

Q. In other words, you are the manager, are you, of Exchange Orange?

A. I am the manager of Exchange Orange Products Company.

Q. To what extent would you confer with the manager of Exchange Lemon on Exchange Orange products? By that I mean, say, Valencia single-strength orange juice.

A. I wouldn't confer with the manager of Exchange Lemon Products at all on oranges or grapefruit, and the same thing in reverse.

Q. Then you in fact determine the price, do you not, at which single-strength Valencia orange juice shall be sold, is that right?

A. I am the final word.

Q. And no one else has anything to say about that price?

A. They can argue with me, but it is my final decision.

Q. Have you ever had any arguments with anybody about the price at which you determine single-strength orange juice, for example, shall be sold?

A. They may say it is a little bit too high or they may [404] say it is a little bit too low and recommend a change, because they are closer to the market, they are talking to the trade, the brokers and all that, and that is one of my sources of information to help me make up my mind. I depend upon it.

Q. In any event, you determine the price at

(Testimony of James A. Finley.)

which the product shall be sold to Sunkist, is that correct? A. Yes, that is correct.

Q. Now, coming back to this question of the quantity of products fruit that was available for processing in 1951 by outside processors, did you handle any of that fruit?

A. The fruit that is handled by the outside processors?

Q. Yes.

A. I do not handle the fruit sold by Sunkist Growers in outright sale, but all other fruit turned over to the EOP Company was handled by me. [405]

Q. So that unless a buyer paid cash for the fruit or paid for the fruit in cash, you handled all other fruit, that is, oranges, for Sunkist that went into any processed product; is that correct?

A. That is correct.

Q. Now, did you have occasion to look around for outside processors in 1951 to take care of any of the oranges that you couldn't process in Exchange Orange plants? A. I did.

Q. Whom did you contact—withdraw that.

First, when did you first determine that there was a greater amount of Valencia oranges that were going to be available to Sunkist that the Exchange Orange plant couldn't process on its own?

A. Well, I probably knew that in November, December, late in the fall, if the fruit grew as estimated, if there wasn't any cold weather and the elements changing it, I knew there would be a bumper crop.

(Testimony of James A. Finley.)

Q. In other words, you knew as early as late fall of 1950 that the product Valencia orange crop—rather, the product Valencia oranges that were going to be available for processing purposes in 1951, was going to be larger in amount than Exchange Orange could handle at its own plant, is that correct?

A. Taking the weather into consideration and all that, [406] the fruit that was on the tree at that time.

Q. Did you make that estimate yourself?

A. No. That is the Government estimate I spoke about.

Q. How did you get that information on which you based your determination of that fact?

A. As I said, it was from Mr. Wilcox and the Sunkist Growers.

Q. Did Mr. Wilcox give you that information on which you made this determination, or was it made by Mr. Wilcox?

A. Well, first, to get an estimate, you get an estimate of the total crop among all marketing organizations in California, and then 100 per cent of them do not belong to Sunkist, so if there is 70 per cent. 72 per cent, that is taken into consideration, the number of cars shipped, and the balance will go to products. That is made in the winter months.

Q. In other words, there is some, of course, Valencia oranges that Sunkist doesn't handle that are available for processing purposes?

A. That is correct.

(Testimony of James A. Finley.)

Q. Do you know what organizations have that type of fruit available for independent processing?

A. The Mutual Orange Distributors, which is a co-op., at that time had their own plant at Anaheim.

Q. In other words, they did the processing?

A. 100 per cent of their grower-members. [407]

Q. To the same extent that Exchange Orange does it for Sunkist, I take it?

A. They had facilities at that time, it has since closed up, but at that time they had facilities, to handle all the product grapefruit from their members.

Q. Product oranges we are talking about.

A. They had both.

Q. Do you know of your own knowledge that MOD, so-called—is that what it is called?

A. Commonly called MOD.

Q. (Continuing): ——had any surplus Valencias available to independent processors that came into the market in competition with whatever product Valencia oranges Sunkist had to sell to independent processors in 1951?

A. Not to my knowledge.

Q. What other source, to your knowledge, would an independent processor have for Valencia juice oranges in 1951?

A. Well, there is the American Fruit Growers, which is another organization, and they had their own—they just built it in 1949 or '50, they built a new plant for the production of frozen concentrate—frozen concentrate just started in about 1946, so when the volume increased they put in their own

(Testimony of James A. Finley.)

plant, and before that they sold to independent processors. At that time they had their own plant and they handled all their own fruit. [408]

Q. That was in 1950 or '51?

A. They started in '50, I know they were in full swing in '51, they may have started in '49. They were in full swing in '51.

Q. Do you know any other source of supply of Valencia oranges to an independent processor in 1951, other than those that you have mentioned?

A. Most of the balance of it, outside of those three organizations, the packing houses that are not affiliated with them, they sold through an individual by the name of Morgan Ward, I don't think he had 100 per cent of the balance, but practically all of it, and he sold to independent processors whenever he could, and at the best price, I suppose, that he could get for it. One year selling to one, and one year to the other, wherever he got the best deal. But outside of those four, that was the available supplies of fruit. Anything above that would be so small it wouldn't count.

Q. It wouldn't be of any consequence. Is this a fair statement, Mr. Finley, that Sunkist had approximately two-thirds of all of the Valencia juice oranges that were available for processing by anyone in 1951, and that the other third were available through the companies that you have mentioned?

A. I think it is around 70 per cent, a little more than two-thirds. [409]

Q. All right, 70 per cent, and the balance of 30

(Testimony of James A. Finley.)

per cent, then, was available only from the three companies that you have mentioned, is that correct?

A. That is correct.

The Court: The three companies; Morgan Ward —is that a company or an individual?

The Witness: I think he is an individual.

The Court: By three, then, you mean Mutual Orange, American Fruit, and Morgan Ward?

The Witness: And Morgan Ward, yes. And a very small percentage outside of that.

The Court: Let me ask another question.

In '51 American Fruit were not selling any of their product oranges, they were using them all in their new plant?

The Witness: They had plant facilities to handle all of it, and to the best of my knowledge they did. I don't think they sold any. They may have sold some. [410]

* * *

Q. (By Mr. Dixon): Mr. Finley, are you familiar or do you know what the selling price of Valencia oranges was by Sunkist in 1951 during the processing season?

A. I knew the price that they set after it was set.

Q. Were you here this morning when that matter was discussed? A. Yes, I was.

Q. Was the $4.0, 120-pound solids price the one that was prevailing during the processing season in 1951? A. Yes, it was.

Q. Now, I am wondering if you could tell the

(Testimony of James A. Finley.)

jury just a little bit more about how you got the fruit that you processed. As I understand it, Mr. Kelly was in charge of all of the sales of product Valencia oranges that were actually sold to anyone who wanted to buy them, including independent processors or bottlers, or anyone that wanted to buy product Valencia oranges for use other than consumption, is that correct?

A. That is correct.

Q. Then how was it determined how much you got? I mean how many tons Exchange Orange got that were made available to it? Did Exchange Orange get what Mr. Kelly of Sunkist didn't sell? Is that the way you got it, what was left? [411]

A. Well, you want to go back a little. The packing house is the one that makes the determination as to how much goes into their cull bin, as they call it, and how much is packed fresh fruit. Then the distributing plant, which is Kelly's department, has representatives in the citrus area. They call up the packing houses once or twice a day. Each evening they have an estimate of the number of boxes of fruit which each packing house has for products. They in turn call up the citrus distributing plant located in Los Angeles, each one of these salesmen calls up and tells them how many boxes by individual houses they have. That is done late in the afternoon, probably around 3:30 or 4:00.

The Court: This citrus distributing plant is Sunkist?

The Witness: Is Sunkist, under Sam Kelly. He

(Testimony of James A. Finley.)

then, or his men allocate or tell the independent processors where they can pick up their fruit if they want to buy.

So after he gets through that, he has some more fruit. So about 4:30 he will call our plant, our truck dispatcher, as we call him, and tell him there are so many boxes at this house and so many boxes at the other house, and that fruit is to be gotten out of those houses before noon the next day.

So we take what is left over after sales.

Q. (By Mr. Dixon): And you then have the disposition of those product oranges from that point on, is that correct? [412]

A. Yes. If there is more fruit, if he culls out more fruit than we have got capacity to handle, that is still our responsibility to see to it that it is taken care of.

Q. I believe Exchange Orange entered into some so-called purchasing and processing contracts in 1951, did it not? A. Yes, we did.

Q. What companies, if you recall, did you make any kind of arrangements with in 1951 for processing, or were able to process Valencia oranges into juice products?

A. Well, first, it was early in March, or in March anyway, I approached Mission, Hyland-Stanford, and a little later, a month or so later, Bireley's, which is a division of General Foods, which is also Bird's-eye. The reason I approached them first is they turn out this pasteurized or hot concentrate. They have got plant facilities for more

(Testimony of James A. Finley.)

than what they actually want to buy, because they are franchise bottlers, and they turn out and receive just the number of oranges to make their product, so they may be through before the season is half over. I know they have facilities available, so they are the first ones I approach, because I know I can have them.

Q. Do any of those companies, Mission Dry, General Foods, or Hyland-Stanford, process single strength Valencia orange juice for sale in the markets of the country, to your [413] knowledge?

A. General Foods did, but not in 1951. They did back in 1945 and 1946.

Q. Is that one of the companies that you mentioned were processors of single strength Valencia orange juice, is that correct?

A. They were all hot concentrate with the exception of Bireley, and he was also a frozen concentrator.

Q. And the concentrate that was processed by any other company that you have mentioned was in fact sold under the Sunkist label, was it not, through your department?

A. The concentrate?

Q. Yes. A. Ask that question again.

Mr. Dixon: Read the question, Mr. Reporter.

(Question read.)

The Witness: The concentrate that was produced for the account of Exchange Orange Products was sold to Sunkist.

(Testimony of James A. Finley.)

Q. (By Mr. Dixon): I am trying to determine, Mr. Finley, whether all of the oranges, the concentrate that may have been processed under any arrangement that you may have made with Mission Dry or General Foods or Hyland-Stanford, was in fact processed for the account of Exchange Orange and sold by Sunkist as a Sunkist product under the Sunkist label.

A. The three firms produce concentrate for themselves, [414] and then any under these arrangements you talk about were produced for the account of Exchange Orange Products Company.

The Court: Go ahead.

The Witness: The two of them producing hot concentrate, it was not sold under the Sunkist label, it does not carry the Sunkist label but is sold through the Sunkist Growers.

In the case of Bireleys, General Foods, we had them produce frozen concentrate for us, and that was sold under the Sunkist label.

The Court: You apparently have skipped a gap. At least I don't follow it. You asked whether arrangements were made with these companies. He said he approached them.

Were arrangements made with them?

The Witness: They were.

Mr. Dixon: Thank you, your Honor. I was about to come to that point.

The Court: Under these arrangements Bireleys made frozen concentrate for Sunkist, which was sold under the Sunkist name?

(Testimony of James A. Finley.)

The Witness: Sunkist label, and sold by Sunkist.

The Court: And Mission Pak and Hyland-Stanford made a hot concentrate for Sunkist, which was sold by Sunkist but not under the Sunkist label?

The Witness: Yes.

The Court: It was sold under some other label by Sunkist?

The Witness: Exchange label. And then they also produced [416] some for their own account.

The Court: I understand. All three of them were producing for their own account, as well?

The Witness: Yes.

The Court: You weren't concerned with what they produced for their own account?

The Witness: No.

The Court: That was their own business, their own materials?

The Witness: Yes. Mission Pak sold under the Mission label; Hyland-Stanford sold under the Tru-Ade label; and Bireleys under the Bireleys label.

* * *

Mr. Dixon: Offered in evidence, your Honor, by the plaintiff.

The Court: Exhibits 15, 16, 17 and 18——

Mr. Hurd: As I understand it, Mr. Dixon is offering these for general background purposes, and not on the basis of themselves being a cause of action. [417]

(Testimony of James A. Finley.)

With that understanding I have no objection.

The Court: Sometime along the line I want to tell the jury about what this case is about. Isn't this a good time?

Mr. Hurd: Yes.

The Court: Exhibits 15 to 18 are received in evidence. [418]

* * *

Q. (By Mr. Dixon): Do I understand your testimony, Mr. Finley, to the effect that Exchange Orange Products did not sell any oranges?

A. It does not sell oranges. [434]

Q. In other words, that function was performed by Mr. Kelly?

A. Mr. Kelly. The Exchange Orange Products does not sell, even, products. Sunkist Growers products department sells the products.

Q. Now, directing your attention to Plaintiff's Exhibits 15 and 16, which are contracts between Exchange Orange and Hyland-Stanford Company, will you tell the jury what kind of business Hyland-Stanford is engaged in?

A. Hyland-Stanford makes concentrated orange juice, and they market it under the trade label Tru-Ade. It is a beverage put up in a six or eight-ounce bottle containing orange juice, and it is sold—the common name for a carbonated beverage is soda pop, such as Mission. It so happens that Tru-Ade is a non-carbonated orange beverage.

Q. Does Exchange Orange make any product comparable to that made by Hyland-Stanford?

(Testimony of James A. Finley.)

A. Yes, it does.

Q. And it is sold in competition with the products of Hyland-Stanford in the interstate markets of the conutry?

A. It is sold to similar customers as Hyland-Stanford.

Q. Directing your attention now to Plaintiff's Exhibit 17, the same being a contract between Exchange Orange and Mission Dry Corporation, will you state to the jury what Mission Dry Corporation makes, what products it makes? [435]

A. Mission Dry makes a carbonated beverage, orange beverage, in the case of these contracts. First they put up, they form a concentrated juice, and then during their off season they will take that out and make a syrup, and then that is shipped to the bottlers scattered throughout the country. Mission happens tc be a franchise bottler as we call it. That is, bottlers have a certain contract with Mission to distribute in that area, and that is what we call a franchise bottler. So they send them the concentrate. The bottler then takes this concentrate, adds, sugar, water, or any other ingredients that Mission specifies to add, such as color, and it is put up in a 10 or a 12-ounce bottle by the bottler and distributed by them.

Mission also makes what we term a full line of carbonated beverages. That is, they will make root beer, lemon-flavored drinks, or raspberry, but a full line of carbonated beverages.

In the case of Tru-Ade, they make just the

(Testimony of James A. Finley.)

orange, as far as I know. I think Tru-Ade makes some grape, too, pardon me. [436]

The Court: Both these companies just make the concentrate, is that right?

The Witness: They make the concentrate into a syrup form and ship to the bottlers for them to dilute with water and distribute on.

Q. (By Mr. Dixon): I was under the impression, Mr. Finley, that neither Hyland-Stanford nor Mission Dry made products for sale in interstate commerce that were made by Sunkist out of oranges.

A. We sell the concentrate.

Q. Sunkist does not sell carbonated beverages, does it, like Mission Dry and Hyland?

A. We sell the concentrate just like they do for the carbonated beverages. [437]

* * *

Now, coming back to the question I asked you a moment ago, Mr. Finley, will you tell the jury what products General Foods makes out of oranges?

A. Bireley's, which is a division of General Foods, early in the season, or they can make it throughout the season, but normally early in the season they make a concentrate very similar to the Hyland-Stanford type concentrate, that is, they make up a concentrate, add the citric acid, oils, any flavors, color, to it, and ship that on to their distribution points, and then the additional sugar and water is added.

(Testimony of James A. Finley.)

In addition to that—well, they also have other flavors. Exactly what they are, I don't know, except what are in the market, and you probably know more about that than I do. I think they have grape—I know they tried a grapefruit at one time.

Q. Do they also make orange products that are sold in interstate commerce in competition, shall we say, with those made by Sunkist?

A. Yes, they do.

Q. What are those products?

A. Well, we make a product, too, that goes in the same field. It is what we call a dairy field, it is a dairy orange. It is a still drink. [438]

Q. But most of the products made by these three companies that we have just mentioned are in the beverage field, are they not? I mean carbonated beverage field?

A. Up to this point. There is also General Foods. Bireley's have a frozen concentrate. General Foods owns Bireley's. They also have Bird's-Eye. Bird's-Eye have most of their concentrate made in Florida, but they have plaint facilities out here and they will make frozen concentrate in the little six-ounce can, and they make that in addition to these beverages like Hyland-Stanford. Hyland Stanford and Mission do not have frozen concentrate equipment to make a satisfactory product.

The Court: I am in doubt now and I would like to ask some questions to clear this up in my own mind. What is the product that Exchange Orange

(Testimony of James A. Finley.)

puts out in the way of concentrate? What does it call it?

The Witness: We have 200 of them. I can go on and explain just what this is.

The Court: Well, here is what I am getting at, and maybe we can shorten this down, if you have 200 products.

The Witness: No. I will take just one.

The Court: Is the product that Exchange Orange puts out in the way of concentrate then ready for mixing to make drinks with? And the same question as to Mission Dry, Bireley's and Hyland-Stanford? I understood you to say Bireley's took the [439] concentrate and added syrup and sugar, so I take it when Bireley's gets through with it, the thing that they put out is the kind of thing a drug store would have, similar to the syrup a drug store would have.

The Witness: No. These contracts all refer to the manufacture of a 65 Brix concentrate.

The Court: That is per cent?

The Witness: Brix means per cent soluble solids, so that 65 Brix is 65 per cent soluble solids. It is all, of course, orange.

Q. (By Mr. Dixon): I am not sure, Mr. Finley, that the jury understands. That is a new term we haven't had occasion to use yet. What is meant by a 65, what do you call it, degree Brix?

A. Degree Brix.

Q. Will you tell the jury just what a 65 degree Brix orange concentrate is?

(Testimony of James A. Finley.)

The Court: That is B-r-i-x.

The Witness: B-r-i-x.

The Court: Named after some man, I suppose.

The Witness: I don't know.

The Court: Who invented the test, I guess.

The Witness: I don't know. 65 Brix is the per cent soluble solids. You go to straight sugar solution, for instance, and if you had 65 Brix, that means 65 per cent sugar [440] and 35 per cent water. In the case of orange juice, 65 Brix means soluble solids. It is anything that goes in solution, that is, it is the sugar and acid or any other minor elements, mostly sugar and acid. So ordinary orange juice will run from, oh, 11 to 13 per cent solids, which is Brix.

We take that and concentrate it in a vacuum pan 160 degrees Fahrenheit in the case of so-called hot concentrate, and around 55 to 60 degrees Fahrenheit in the frozen concentrate. We concentrate that down to any level. In the case of frozen concentrate, it is 42 Brix per cent solids.

These contracts call for concentrating down to 65 degrees Brix.

The Court: They were making this material for you, for Exchange Orange?

The Witness: Yes.

The Court: Turning it over to you after it was made?

The Witness: They turn it over to us after it is made. There is one interesting thing, if you keep in mind that the soluble solids for orange juice is

(Testimony of James A. Finley.)

about 12 to 14 soluble solids, and 12 per cent means the orange is 88 per cent water. Orange peel is also about 88 per cent water. That means it has just as much water in it as your orange juice, except the one is soluble and the other is not. Just like sugar is soluble and sand isn't.

So the Brix means what goes into solution, not what [441] does not go into solution.

Does that cover it? [442]

* * *

December 16, 1955—10:00 A.M.

* * *

Q. I believe when we adjourned yesterday, Mr. Finley, we were discussing some contracts that were entered into by Exchange Orange in 1951 with Hyland-Stanford Company, Mission Dry, and General Foods. We also talked about concentrates, orange concentrate and products which these companies made.

Did any of these three companies make single-strength orange juice, do you know?

A. General Foods made single-strength orange juice, but I am sure it was back in the 1946-1947 period, not in 1952. [446]

Q. Not in 1951. And these three companies, then, were engaged primarily in processing oranges into concentrate, that is pasteurized concentrate—is that what you call it?

A. Pasteurized concentrate, except for general

(Testimony of James A. Finley.)

Foods, and they operate on frozen concentrate for the use of Bird's-Eye.

Q. Now, I am not sure that the jury understands just what is meant by pasteurized concentrate. Can you explain what that product is to the jury and how it is secured?

A. The pasteurized concentrate is a concentrate that has been made way back since 1945 that I know of. The juice is extracted from the oranges by a number of different types of juice machines. Back before 1930, it was done by hand, just like you would in the kitchen, but in the thirties juice machines were developed and they have different types of machines. There is one type that squeezes out the orange juice just like you would with a Sunkist reamer at the rate of about 200 oranges a minute. There are other pressing types.

The juice is screened and then what we call flash pasteurized. It is processed at a temperature of 190 to 195 degrees Fahrenheit for 30 seconds or 45 seconds, and then immediately cooled, run into a vacuum pan, where the water is evaporated off in the form of steam at a temperature of about 105 to 110 degrees Fahrenheit. At that point it [447] makes a very good concentrate.

If you start with orange juice, for instance, the single-strength orange juice, concentrated down to about six or seven to one, depending upon how much sugar you have in the original oranges, why if you concentrate it six to one, you come out ap-

(Testimony of James A. Finley.)

proximately 65 Brix as I spoke about yesterday. That product is a product that is used in what we call beverage base. Probably 90 per cent, 95 per cent of what is produced goes into beverage base or orangeades, the soda pop type of drink, or up into the higher juice contents of 15 to 20 per cent, even 30 per cent juice in the finished drink. It is strictly a beverage.

The contracts call for—— [448]

Q. May I stop there? When this pasteurized concentrate is made, is it then frozen sometimes into brick, is that what is known as frozen orange concentrate?

A. We are talking about the hot concentrate. It is pasteurized so that it kills all the bacteria or yeast that are naturally in the orange juice, so it is sterile, it should be, and it can then be stored. If it is about 65 Brix or above it can be stored at 35 degrees Fahrenheit in cold storage, and held in that form for a year or two, depending on the temperature of storage.

Q. Is that what is known as the frozen orange concentrate?

A. No. That is what is known as the pasteurized or hot concentrate for beverage bases.

Q. And that is the product primarily that these companies, with the exception of General Foods, were making, is that correct?

A. Yes. General Foods also makes that for their beverages.

Q. I understand they do, too, but in addition to

(Testimony of James A. Finley.)

that, General Foods also made a frozen orange concentrate, did they not? A. Yes.

The Court: Let me ask a question. I am not getting at what I want to know. Maybe I will do worse than you. We [449] will see.

This hot concentrate which Exchange Orange makes itself is in liquid form, isn't it?

The Witness: It is 65 per cent solids, 35 per cent water; it is a very viscous liquid.

The Court: A heavy syrup?

The Witness: Yes, heavy syrup.

The Court: Exchange Orange, when it makes this, sells it under what label?

The Witness: I think we all make it. And then it goes in storage as 65 Brix concentrate. We will sell that as 65 Brix concentrate to some customers. To others we will what we call compound it, that is, take so many gallons of the concentrate, add citric acid, oil, and the other ingredients, so when the consumer gets it they just have to add the sugar to carry it on.

In the straight concentrate, 65 Brix concentrate that we sell as such under the Exchange label, we sell that to supply houses who add their own acids, sugars, and put it up in the same type of package that we do.

The Court: Then you sell it two ways, as the 65 per cent Brix under the Exchange label, and then you sell it after you have done certain further compounding?

The Witness: Yes.

(Testimony of James A. Finley.)

The Court: Do you sell that under the Exchange label? [450]

The Witness: Under the Exchange label.

The Court: Do you have a name for that when you have done this further work to it?

The Witness: There is what we call a bottler's base. That goes to the bottlers of carbonated beverages. They use carbonated water before it gets to the ultimate consumer. Then we have another one that we call a dairy base, which goes and is distributed through the dairy routes, which does not have carbonated water. That is what we call a still drink.

The Court: When you had these contrates with these three companies, Hyland, Mission, and General Foods that we referred to, under the contracts they made for Exchange Orange this 65 Brix?

The Witness: That's right.

The Court: I suppose it was kept in large containers?

The Witness: 50-gallon barrels.

The Court: And turned over to your company?

The Witness: Yes.

The Court: Did Hyland—just take Hyland—did Hyland also make for itself a 65 per cent Brix syrup or concentrate?

The Witness: Yes, they do the same thing, they make it in 65 Brix first; it could vary between 65 and 67, that is immaterial, depending upon their finished formula; but they will concentrate it down to approximaetly 65, put it in storage themselves,

(Testimony of James A. Finley.)

during the Valencia season, and then they [451] will pull it out of storage and compound it, February, March, April, and then can it.

The Court: They sell it compounded?

The Witness: Yes.

The Court: Do they sell it in 65 per cent Brix?

The Witness: No, they do not sell the straight 65 Brix concentrate.

The Court: Does Mission Dry sell the 65 per cent Brix that it makes for itself, or does it only sell it compounded?

The Witness: They just sell it compounded. I think in some cases on government orders or British orders they have done some of it, but that is not their primary business.

The Court: What about General Foods, does it sell the 65 Brix, or just the compound that results from further work?

The Witness: I think they have sold some 65 Brix. In case they would maybe miss their estimate on the amount of concentrate they would put up, and have some excess, they would sell it off before the next season. But that was not their primary business.

The Court: Ordinarily they sold the compounded product?

The Witness: The compounded product, yes.

The Court: All right.

Q. (By Mr. Dixon): Now, can you tell the jury, Mr. Finley, what is meant by frozen orange concentrate?

(Testimony of James A. Finley.)

A. The frozen orange concentrate is the concentrate [452] that is put up in the small 6-ounce cans that is so popular now in the grocery stores in the deep freeze. That is made by taking the single-strength juice, concentrating it down to about 58 Brix, that is about a 5½ to 1 concentration, under a low temperature evaporator, and that evaporator concentrates the juice down, evaporates the water off at a temperature of around 55 degrees, and at the rate of about 1200 gallons an hour. So we start in with about a 5, 5½ to 1 concentrate, and then single-strength juice because during the concentration you take off some of your volatile flavors, we add back single strength juice to this 58 Brix concentrate to 42 Brix. That, then——

Q. Do you mean 42 degree Brix?

A. 42 degree Brix, which is 42 per cent solids, which is an even 4 to 1 concentrate. That is, you take one can of that and then add three cans of water and you get four cans of single-strength orange juice. And when it is mixed, it is cooled down immediately to about 18, 19 degrees, which is as low as you can go without freezing, put in the cans, 6-ounce cans, at the rate of about 400 a minute, and sealed, run through a cold tunnel at 40 degrees below zero, it takes about 40 minutes to go through, and it comes out frozen solid and it remains at temperatures of zero or below during all storage until it gets to the retail store, and then the housewife. [453]

Mr. Dixon: One of the jurors has a question. I

(Testimony of James A. Finley.)

don't know whether your Honor cares to hear it.

The Court: Yes.

Juror Colby: May I ask a question? I would like to know whether the quality is as good in a concentrated juice as it is in a single strength?

The Witness: The quality of the juice?

Juror Colby: Yes.

The Witness: Well, the quality of the juice——

Juror Colby: Or the vitamins.

The Witness: The vitamin content, I would say in all three about 95 to 98 per cent of the vitamins are retained, so the health value would be the same.

The Court: There is a housewife who is going to benefit from this trial and she wants to find out about it.

The Witness: The vitamin contents are down at elevated temperatures and long storage, but as far as the juice going in the three products is concerned, your Valencia season starts in the early part of May and, as you know, they are a little more tart than they are later in the season. So early in the season the fruit is used for these so-called hot concentrates to go into beverages, because it is tart and there is more citric acid to be added. It is also used late in the season, but we have more citric acid to add depending upon the processor. Ourselves, we do not figure [454] we can start on a single strength or frozen concentrate until just about the middle of July when the flavor, acid, and all that, is correct. Early in the season, it is still a little bit immature, so we use the best fruit for

(Testimony of James A. Finley.)

single and frozen, although for those two we will use the same fruit.

The Court: All right. Go ahead.

Q. (By Mr. Dixon): Now, the pasteurized concentrate, that is the orange pasteurized concentrate, I think you testified has been made since about 1925 as a commercial product?

A. To my knowledge.

Q. The frozen concentrate citrus juices were relatively new, were they not, in the commercial market around about 1947 to 1948, 1950?

A. It started shortly after the war, probably 1946. The first year or so was more or less experimental, so it is a question of what year it started commercially.

Q. Sunkist in any event didn't really start into the frozen concentrate product market until about 1951, did they, Mr. Finley?

A. Started in the frozen concentrate market in 1950.

Q. On a large commercial scale?

A. On a large commercial scale in 1950, but not under the Sunkist label.

Q. They were operating then under the Exchange label? A. No. [455]

Q. What was it?

A. In 1950 we processed for Minute Maid under their label and Bird's-Eye.

Q. I am talking only about Sunkist, what Sun-

(Testimony of James A. Finley.)

kist was doing in 1950 in the frozen concentrate product, Mr. Finley.

A. We started the Sunkist label in 1951 or the the fall of 1950, the winter.

Q. Well, can you tell the jury when Sunkist commenced on a large commercial scale to develop a frozen concentrate, I mean a market for frozen concentrate citrus juices?

A. When we developed the process for doing it—in the winter of 1948, we had our plans and specifications all up to make this product. In January, there was a major freeze. We knew we could not make a quality product out of that.

The Court: I think counsel's question was not when the process was developed.

Mr. Dixon: That's right.

Q. When did Sunkist start on a large commercial basis to promote the sale of frozen concentrated citrus juice?

A. Sunkist Growers, the sales department, sold in large scale in 1950 to Minute Maid and Bird's-Eye. In 1951, under the Sunkist label.

Q. Pardon me. I am sorry, Mr. Finley.

The Court: Well, he has answered the question now, [456] hasn't he?

Mr. Dixon: Yes.

Q. Sunkist was merely producing for the Minute Maid label, were they not? That was not sold by Sunkist under any Sunkist label, was it?

A. Exchange Orange Products produced it, all the product, and it was sold by Sunkist Growers

(Testimony of James A. Finley.)

products department. They sold it to Minute Maid, who distributed it.

Q. Will you tell the jury what Minute Maid means, what that means in your answer?

A. Minute Maid is a processing—company, a Florida company.

Q. Is it connected in any way with Sunkist?

A. It is not.

Q. That is what I wanted to clear up. In other words, Exchange Orange was making a frozen product and selling that product in what the industry calls, perhaps, shiners, that is, in unlabeled cans?

A. No.

Q. And then put the Minute Maid label on the can?

A. The cans are lithographed. We get the cans with the label already on. It is a label product, private label.

Q. Minute Maid buys that product from Sunkist and sells it in the open market to wholesalers and retailers? A. That's right. [457]

Q. Under its label Minute Maid?

A. That's right.

Q. But the product itself is made by Exchange Orange? A. That's right.

Q. Is that correct? A. That's right.

Q. I understand you to say that in 1950 you were making frozen concentrate which was sold to Minute Maid. My question is, Mr. Finley, again, when was it that Sunkist commenced to sell frozen concentrate citrus juices under its own label in the

(Testimony of James A. Finley.)

United States market, shall we say? Was it 1951?

A. It was the winter of 1950, right at the end of that year, a very small pack, and then in major proportions in 1951 after August.

Q. That is what I was trying to determine. Now, before we get back to these contracts, I would like to ask one or two other questions that may be helpful to the jury. What is the capacity of Exchange Orange plants to produce citrus products on an eight-hour shift per day, shall we say, just approximately, in tonnage?

A. In 1951, I think the capacity was right around 1200 tons in 24 hours.

Q. For what product?

A. For all products. [458]

Q. By "all products," you mean what?

A. Hot concentrate, single-strength juice, frozen.

Q. Can you do all three at the same time in the same plant?

A. You can do part of all three of them at the same time, but we may not have enough juicing equipment, for instance, to keep everything going. We would have to slow down maybe one department to keep going, but over all it is 1200 tons.

Q. Using the same basis for answering the question, do you know what the capacity of the plant of Hyland-Stanford was in 1951?

A. Oh, around 250 to 300 tons.

Q. And do you know what the plant capacity of General Foods was—or Mission Dry, first?

(Testimony of James A. Finley.)

A. Mission Dry was about 300.

Q. And General Foods?

A. Between 300 and 350.

Q. Directing your attention to Plaintiff's Exhibit 15, the contract entitled an orange concentrate processing contract dated June 19, 1951, between Hyland-Stanford Company and Exchange Orange Products Company, had Exchange Orange had any concentrate processing contract with Hyland-Stanford of the type of Exhibit 15 prior to the execution of this contract, Mr. Finley? [459]

A. I think we had—well, I know we had one before 1951. It may have started in 1949 or 1950, but it was started before 1951.

Q. It dealt with the same product, did it, the orange concentrate?

A. Yes, pasteurized concentrate.

Q. Now, directing your attention to paragraph 2 of Exhibit 15, will you state to the jury for their information the basis under which Hyland-Stanford was to be paid for any services performed under this contract—by the way, will you first tell the jury just what services, if any, were to be performed by Hyland-Stanford under this [460] contract?

* * *

A. Paragraph 2 says the processor is to be paid 60 cents per gallon for producing 65 Brix orange concentrate. That rate of 60 cents——

Q. I am sorry. Oh, had you finished your answer?

(Testimony of James A. Finley.)

A. No. I was just reading from the contract.

Q. That is what we are trying to avoid.

A. I will tell you why.

Q. All right, go ahead.

A. That 60 cents was by negotiation with Hyland-Stanford as their cost of producing this 65 Brix concentrate. I sat down with them and they went over in general what their costs were. I was familiar enough with it from our own operations and knew it was reasonable and gave them a small amount, I think it was five per cent, for what I call an operating profit, because there was no profit in that figure.

The Court: Wait a minute. You mean the 60 cents—— [461]

The Witness: Included five per cent.

The Court: Included the five per cent?

The Witness: Yes. This was cost plus five per cent.

Q. (By Mr. Dixon): By the way, I presume you negotiated all the contracts, Plaintiff's Exhibits 15 through 18, did you, Mr. Finley?

A. Yes, I did.

Q. You said that this contract provided for overhead expenses of the processor, a reasonable profit on the complete operation for the account of the processor, is that correct?

A. The overhead of the processing, not the overhead on their product which they might have for sale.

(Testimony of James A. Finley.)

Q. The basis under which the 60 cents per gallon made to Hyland-Stanford was determined took into consideration the general overhead, did it not, costs and expenses of Hyland-Stanford in doing this processing for Exchange Orange, and provided for a reasonable profit in addition thereto to Hyland-Stanford on the operation?

A. It was a negotiated price which they and we were satisfied with. [462]

Q. In other words, did you have any discussion with them in negotiating this contract as to whether this was to be one by which they were to not only secure their overhead costs, but in addition thereto were to be paid or to have within the amount paid to them a reasonable profit on the entire operation?

A. I don't quite understand your question.

Mr. Dixon: Read it, please.

The Court: I think he has already answered that.

From his discussion with them he was attempting to allow them a 5 per cent profit on the processing work. Is that right?

The Witness: That's right. Because there was no price for the fruit in it. Just operating cost.

The Court: You supplied the fruit, and you got back the concentrate?

The Witness: Yes, we got back the concentrate, oil, and peel.

The Court: You got back everything?

The Witness: Yes.

(Testimony of James A. Finley.)

The Court: Except what might be waste?

The Witness: That is right.

The Court: For that you gave them 60 cents a gallon, which was their cost, their overhead, and a 5 per cent profit?

The Witness: That's right. [463]

The Court: The way you computed it?

The Witness: Yes.

The Court: Maybe the way they were computing it they were getting a higher profit?

The Witness: Of course if we didn't give them this contract, their overhead would have been going on anyhow, so in their own mind they figured they were making more profit than this. But figuring costs properly, you have to figure overhead as in.

Q. (By Mr. Dixon): Directing your attention to paragraph 12, the amounts due Hyland-Stanford for processing were to be paid weekly, as I understand that provision; is that correct?

A. According to the contract: "Supplier will make payment to processor not earlier than 10 days after the close of a week and no later than two weeks." And we made that when necessary.

Q. So the payments, then, for this processing operation were made to Hyland-Stanford shortly after Exchange Orange received the weekly billing therefor, is that correct?

A. I don't know whether it was actually paid at the end of the week or month, but if they needed the money they would have gotten it at the end of the week.

(Testimony of James A. Finley.)

Q. Directing your attention to paragraph 11, will you state what that paragraph relates to? [464]

A. Well, that is processor performance.

"The processor agrees to operate its plant as efficiently when working under this contract as it ordinarily operates on its own production. The processor further agrees to allow supplier to make necessary inspections of product, production, and records as pertain to this contract, and to obtain necessary samples other than those supplied by processor."

The purpose of that clause is that in these juice machines you can get different yields in gallons per ton. We wanted them to run their plant and get as many gallons per ton when they were running for our account as they would have been if they would have been running for their own account. We didn't want them to go ahead and just because they had a processing contract be inefficient and save some money on the contract. And that is the purpose of that clause.

Q. Well, the purpose of this clause was, also, was it not, to permit you to make inspections of the product as it was being processed under this contract, so that Exchange Orange could be assured that the product that they were processing was all right? A. That's right.

Q. Directing your attention to paragraph 15, will you state to the jury what that deals with?

A. Paragraph 15 is just the contract [465] period.

(Testimony of James A. Finley.)

"This contract is to run from June 1, 1951, to May 31, 1952, and thereafter from June 1 to May 31 of each year, unless either party gives notice of termination at least 90 days prior to May 31 of each year."

The purpose of that clause, the Valencia season starts about the 1st of June, so this covers the full Valencia season over the winter, and it saves the job of writing a new contract every year, to put a clause like that in. It is a continuing contract, if both sides are satisfied.

If either side is dissatisfied, they could cancel it.

Q. Can you state to the jury whether that contract continues in effect at the present time under this provision? A. Yes, it does.

Q. I believe this contract was signed by Exchange Orange Products on June 19, 1951.

A. Yes.

Q. Directing your attention to Exhibit 16, the only date that would indicate when that contract was signed appears to me under the contract as June 29, 1951; do you find any other date on the contract, Exhibit 16?

A. It says June 29, 1951.

Q. This contract is entitled a Fruit Purchasing Contract, Mr. Finley. Directing your attention to paragraph 1 thereof, will you state to the court what that deals with?

A. Paragraph 1 is on fruit supplies. [466]

"The Exchange Orange Products is to be the

(Testimony of James A. Finley.)

only supplier of oranges to Hyland-Stanford Corporation unless otherwise mutually agreed upon because of inability of seller to supply requirements of purchaser.

"It is further agreed in the event of short fruit supplies purchaser will receive his proper pro rata share of fruit along with other purchasers of seller's fruit."

This contract covers the concentrate which Hyland-Stanford made for their own account, and they kept the merchandise, and this was assurance that we would furnish them the fruit if at all possible.

Q. Then this is a little different kind of contract than Exhibit 15? A. Yes.

Q. Under this arrangement or contract, Exhibit 16, Hyland-Stanford is purchasing or making some arrangements, are they not, with Exchange Orange, to acquire oranges from Exchange Orange, or Sunkist?

A. To acquire the oranges and concentrate, you might say.

Q. Is Sunkist or Exchange Orange selling any concentrate that it processes under this contract to Hyland-Stanford? A. This contract——

Q. Can you answer that, if you can, yes or no, Mr. [467] Finley?

A. The Exchange Orange under this contract sells them the concentrate.

Q. Sells the concentrate? A. Yes.

Q. Do you mean they sell concentrate that Exchange Orange itself manufactured and processed?

(Testimony of James A. Finley.)

A. Hyland-Stanford manufactures this——

The Court: You mean it sells them fruit to make concentrate for themselves, is that right?

The Witness: We sell them concentrate, not the fruit.

Q. (By Mr. Dixon): I must confess that I am somewhat confused, Mr. Finley.

Directing your attention, in particular, to paragraph 2 of this contract, I find the language, "In the event purchaser finds it necessary to stop the purchase of fruit, then Section 10 is to apply to the situation," end quote.

Is it your understanding that this particular language does not appear to mean what it says, namely, that Hyland-Stanford is not purchasing fruit under this contract?

A. Let me see. It isn't very complicated.

The way this contract works is that Hyland-Stanford purchases the fruit from Sunkist Growers.

Q. It is a purchase of fruit from Sunkist?

A. A purchase of fruit, but not paid for. [468]

Q. But not paid for?

A. This is what I call a deferred payment plan contract. The merchandise which they make, the concentrate which they make, then goes into Lawrence Warehouse, and the only way that they can get that out is for them to pay the Exchange Orange Products Company for the concentrate as they take it out. So the concentrate is security for the fruit

(Testimony of James A. Finley.)

that goes into the product. They pay the current market price.

Q. Well, directing your attention to paragraph 11 of this contract, will you state to the jury what that refers to or indicates?

The Court: Before you go to that one, I didn't understand this last question.

I think we can state to the jury that Lawrence Warehouse is a nationwide organization that has warehouse facilities whereby products may be placed there, and Lawrence Warehouse holds them, so that, in this case a company that has supplied certain materials may get their money out.

Can counsel explain Lawrence Warehouse any better? They probably can.

Mr. Hurd: I have wondered about it myself. I will accept your version.

The Court: Actually I tried a case involving them, and they have little compartments in these warehouses closed in with chicken wire, and they will take certain goods and put [469] them in here and lock them up and hold them until they can be pulled out, and by that warehousing they see to it that somebody that has some interest in it gets their money out. It is sort of a security arrangement. They operate all over the country.

But now my question is this: You said this concentrate that they make, which they are making now for their own account, is put in Lawrence Warehouse, and then as it is released from Lawrence Warehouse and sold they pay you for the

(Testimony of James A. Finley.)

concentrate. Do they pay you so much per gallon of concentrate, or do they pay you at that time for the oranges which were used to make the concentrate?

The Witness: They pay for the concentrate, the price of the concentrate based upon the price of fruit which went into that concentrate, yield, and so forth. It comes out just like they bought the fruit, but they actually pay us, and it is warehoused there, as so much per gallon for concentrate, which reflects the price of the fruit. They have their own manufacturing costs in there, so we do not recover any of that, of course.

Q. (By Mr. Dixon): Reference has been made by the court to this Lawrence Warehouse; can you state to the jury whether or not there was a Lawrence Warehouse immediately adjacent to the Hyland-Stanford plant, and this arrangement under which Hyland-Stanford provides for the storing of this product in [470] the Lawrence Warehouse?

A. The Lawrence Warehouse is a national organization, it is bonded, and as was said, they put chicken wire up. So Lawrence Warehouse can be in a person's own plant. In this case it was at the Hyland-Stanford plant. A certain portion of the warehouse was blocked off with chicken wire.

Q. In the plant of Hyland-Stanford?

A. In the plant of Hyland-Stanford. A lock was put on the door, and an employee of Hyland-

(Testimony of James A. Finley.)

Stanford was bonded, and was the only man with that key. For them to get anything out of there, or for us, they had to give us a check, along with a Lawrence Warehouse release.

And those Lawrence Warehouses can be located any place you want to, as long as they will bond it.

Q. Directing your attention back to paragraph 11, will you perhaps read——

Mr. Hurd: Pardon me. One of the jurors had a question.

Mr. Dixon: I am sorry. I didn't see.

Juror Johnstone: Do they pay for the concentrate before they make it, I would like to know?

The Witness: No, they do not pay. It is a deferred payment plan, a credit plan for the purchase of fruit, technically. They get the fruit and make the concentrate, and as it comes out of the warehouse that is the time they pay for it. They pay for their own manufacture. [471]

Mr. Dixon: I think the answer to her question will be if you will answer my question, Mr. Finley?

The Witness: That is on Section 11?

Mr. Dixon: That is right, paragraph 11.

The Witness: "Seller's function.

"Seller's prime function is to supply fruit at current prices but to await payment until purchaser withdraws products from Lawrence Warhouse."

Q. (By Mr. Dixon): In other words, under this contract, Exhibit 16, Sunkist made oranges available to Hyland-Stanford, which were then

(Testimony of James A. Finley.)

processed by Hyland-Stanford into whatever products it wanted to make under this contract from the oranges, the products made were then put in the Hyland-Stanford plant and locked up, so to speak, but no payment was made for any of the oranges that had thus been made available to Hyland-Stanford until Hyland-Stanford sold the products that it had made and which were locked up under this so-called Lawrence Warehouse arrangement?

Now, that is a long question, but does that fairly state the arrangement here, Mr. Finley?

A. Right at the end of that question, did you say when Hyland-Stanford sold it it came out and we got our money? [472]

Q. Well, I thought I indicated that. In other words, Hyland-Stanford did not pay anything to Sunkist under this contract even though the oranges had been delivered to it, shall we say, months, before, until the product that Hyland-Stanford had processed from those oranges was withdrawn from the warehouse, this Lawrence warehouse?

A. When they took the concentrate out of the Lawrence warehouse, it was paid for.

Q. And not before? A. And not before.

Q. That is what I wanted to determine.

The Court: Does the jury understand this? Does anybody not understand it?

This concentrate, as I understand, belonged to Hyland, but there was a claim for the money due for the material supplied, so it was warehoused in this

(Testimony of James A. Finley.)

chicken wire business with the Lawrence Warehouse man on guard—a Hyland man, but bonded by Warehouse, who was the person who would release it. The product at all times belonged to Hyland, did it not?

The Witness: Yes.

Q. (By Mr. Dixon): Now, directing your attention, Mr. Finley, to paragraph 10, will you state what that relates to?

A. Paragraph 10 is entitled Production Facilities.

"Purchaser agrees that in the event it stops buying fruit because of price, or because of [473] excess capacities over its own needs, its production facility shall be made available to seller upon its request. The seller agrees that in the event purchaser stops buying fruit when the average price of fruit purchased under this contract goes above $40 per ton for fruit yielding 120 pounds solids per ton, as described in Section 2, purchaser is permitted to buy fruit of sufficient quantities on the open market to produce requirements of Tru-Ade products. Any production capacities above these requirements shall be available to seller at its request. Details covering the use of purchaser's production facilities or seller's use are set forth in a separate contract called 'Orange Concentrate Processing Contract.'"

That is in the contract.

Q. That is Exhibit 15?

A. The orange concentrate processing contract

(Testimony of James A. Finley.)

is Exhibit 15. The purpose of that paragraph is that with a contract calling for a purchaser to buy all their requirements from you, you could just about price them out of the market, you could raise the price any place you wanted to, so the price was put in there at $40 so they could buy from others.

Also, the purpose of the clause is that they use their own facilities for their own accounts first, and if they [474] have any excess facilities, then we would have a call on them. That is the purpose of the balancing, giving them credit on the fruit. We would have first call on their plant and that would save us putting in that additional capital investment in Ontario.

Q. These two contracts, then, were really tied in together, were they not?

A. Exhibit 16 is the one that they operated on and we assured them of a sufficient supply of fruit to carry on their normal business. If we had more fruit than what we could handle at Ontario, then we would go over to Exhibit 15. Some years we used it and some years we didn't.

Q. But the processing contract was dated, if I understand it, was dated June 19th, and the fruit purchase contract was dated June 29th?

A. Both these contracts were in effect in previous years. There is the same clause in both of them. They are continuing contracts. Neither party reopened them.

Q. This arrangement has been in effect some time?

(Testimony of James A. Finley.)

A. It went into effect probably about 1949.

Q. Under paragraph 13 of Exhibit 16, that provision indicates that the contract is to run on unless it is cancelled by either party?

A. This contract is to be effective June 1, 1951, to May 31, 1952, and thereafter is to run from June 1 to May 31 [475] of each year, unless either party gives notice of termination at least 90 days prior to May 31 of each year.

We put the 90-day clause in there because we wanted to know 90 days before the Valencia season started, so in case they didn't want to continue on we could make other arrangements.

Q. Is that contract still in effect, as you indicated Exhibit 15 was in effect?

Mr. Hurd: If your Honor please, I suppose this is immaterial, whether it is still in effect. I don't know the purpose of the inquiry. I don't know as we should get in the habit of going into periods since the complaint.

The Court: What materiality would its continuance have on the date of the filing of this suit have? The suit was filed in 1952.

Mr. Dixon: Yes, your Honor, but one of the charges is monopolizing the industry, the citrus juice products. I want to know if the contract period still continues in effect. That is tied in to show—in other words, under this contract, one of them, certainly, Hyland-Stanford, is required to continue to purchase all of its requirements of oranges from Sunkist. If there is any other seller,

(Testimony of James A. Finley.)

they have no chance to break into this market under this contract.

The Court: But the suit speaks as of the date of the filing of the complaint in this action. [476]

Mr. Dixon: Correct.

The Court: Which was February 1, 1952.

Mr. Dixon: Yes, sir. I also direct the attention of the court to the fact that the original, I believe the complaint indicated at that time that injunctive relief was also asked for. The plaintiff is still technically in existence.

The Court: Well, of course, we have a different rule on injunctive relief. The relief is as of the date of the decree. Objection overruled.

Q. (By Mr. Dixon): Directing your attention to——

The Court: Was the question answered?

Mr. Dixon: I am sorry.

The Court: Is the contract still in effect, Mr. Finley?

The Witness: It was in effect in 1955.

Q. (By Mr. Dixon): Now, directing your attention to Plaintiff's Exhibit 17, Mr. Finley, the same being entitled Orange Concentrate Processing Contract, dated August 9, 1951, between Mission Dry Corporation and Exchange Orange, and specifically directing your attention to paragraph 2 thereof, will you state what that paragraph relates to?

A. "The processor is to be paid 55 cents per gallon for processing 65 Brix orange concentrate. The volume of production is to be determined by the

(Testimony of James A. Finley.)

nominal content of filled containers. This rate includes all costs from the [477] time of receiving fruit until the moment the juice is ready to be placed in cans or barrels. It also includes a first month storage charge. The principal costs generally are fruit receiving, juice extraction, concentration, pasteurization, refuse disposal, etc., overhead expenses of the processor, and a reasonable profit on the complete operation. The first month's storage, as is included in the 55 per gallon rate, includes the handling in and out of storage, and cooling the product for a period of one month where the processor has such facilities.

"The 65 Brix concentrate shall meet the following specifications:

"Product must be sterile.

"Product must be free from specks.

"Product must have cloud stability.

"The raw juice before being concentrated must have been passed over a 40 or 50 mesh screen as specified by the supplier.

"The Brix of the finished concentrate shall be in a minimum of 65 degrees not corrected for acid." [478]

Q. This contract, Plaintiff's Exhibit 17, is comparable in substantially all respects, is it not, to Plaintiff's Exhibit 15? A. Yes, it is.

Q. And paragraph 2 that you have just read is comparable to paragraph 2 of Exhibit 15?

A. They are comparable contracts.

Q. And under paragraph 2 that you have just

(Testimony of James A. Finley.)

referred to Mission Dry was paid under the price agreed to in this paragraph for the processing costs incurred by Mission Dry in processing the oranges, and in addition thereto, it was assured the reasonable profit in addition to overhead expenses is that correct? A. That is what it says.

Q. It is a fact, isn't it?

A. Yes, it is a fact. It is a comparable paragraph to the other and includes profit. [479]

* * *

Mr. Hurd: I have one question on another subject I would like to ask while the jury is away. This matter of going into matters since the filing of the complaint, I assume that that is going to come up time and time again, and rather than interrupting each time, I wonder if I might have a continuing objection on any question dealing with matters since the filing of the complaint?

The Court: I haven't ever considered this proposition, but actually this is a complaint which asks equitable relief, and I suppose when the case is over with, if the jury returns a verdict for the plaintiff on damages, this court might have authority to issue an injunction if it was so minded. I understand the difference between an action at law and one at equity is that the action at law speaks of the date of the filing of the complaint. The action in equity speaks up to the time of the entry of a decree. Is that right? [484]

Mr. Hurd: That is correct.

(Testimony of James A. Finley.)

The Court: And there is nothing so far to remove the equitable propositions from this case.

Now, is there any prejudice——

Mr. Hurd: I can't tell, but it seems to me that there could well be, and that is why I do feel I should object. It is just a question whether I object each time, or whether I just have a continuing objection.

The Court: You may have a continuing objection. I have already told the jury as far as they are concerned this matter speaks as of the date of the filing of the complaint and gave them a date.

Mr. Hurd: If it will just be understood that I can have a continuing objection to any question dealing with the period after the date of the complaint, then I will not interrupt Mr. Dixon any more.

* * *

Q. (By Mr. Dixon): Directing your attention to Plaintiff's Exhibit 17, paragraph 12 thereof, which reads as follows:

"The processor"—and that is Mission Dry Corporation—"shall invoice supplier"—that is Exchange Orange— [485] "as soon as possible after the close of Sunday to Saturday week."

And then follows something further, and then:

"The supplier will make"—the supplier being Exchange Orange or Sunkist—"will make payment to processor"—that is Mission Dry Corporation—"not earlier than 10 days after the close of a week, and not later than two weeks."

(Testimony of James A. Finley.)

Now, under the provision I have just made reference to, Mr. Finley, Sunkist or Exchange Orange did make payments to Mission Dry for the oranges that were delivered to it and processed under this contract in 1951, did they not?

A. The Exchange Orange Products made the payments.

Q. And not Sunkist? A. And not Sunkist.

Q. But the oranges were delivered by Sunkist?

A. The oranges were delivered by Citrus Distributing Plant of Sunkist.

The Court: This contract 17 is another contract wherein Orange was having Mission Dry make concentrate, 65 Brix concentrate, for Orange, is that right?

The Witness: Right.

The Court: The same as the first contract with Hyland?

The Witness: The same as Exhibit 15.

Q. (By Mr. Dixon): Directing your attention back now to Exhibit 15, the Hyland-Stanford Company contract, the payments [486] to be made to Hyland-Stanford by Orange Exchange, under the provisions of paragraph 12, were made to Hyland-Stanford by Exchange Orange, were they not?

A. They were also made by Exchange Orange Products Company.

Q. Directing your attention to Exhibit 16, the fruit purchasing contract, oranges were delivered to Hyland-Stanford under this contract and paid for to Sunkist by Hyland-Stanford, were they?

(Testimony of James A. Finley.)

The Court: Paid to Orange?

The Witness: Paid to Exchange Orange by Hyland-Stanford.

Q. (By Mr. Dixon): Exchange Orange and not Sunkist?

A. Exchange Orange and not Sunkist.

Q. Now, directing your attention to Exhibit 18, the same being an Orange Products processing contract bearing the dates of June 22, 1951, and July 2, 1951, the June 22nd date being the one at which it was apparently signed by Mr. Ingalls of General Foods, and the latter date being the date on which it was signed by Mr. Smith for Exchange Orange, this contract deals with the processing of frozen orange concentrate by General Foods for Exchange Orange, does it not? Or am I in error in that respect?

A. It has been a long time since I have seen it, but paragraph 2, that refers to 65 Brix pasteurized concentrate.

The Court: That would be hot concentrate? [487]

The Witness: Hot concentrate. Similar to the Hyland-Stanford and Mission.

Q. (By Mr. Dixon): Directing your attention to page 2 of that contract, I find the language, "Frozen concentrated orange juice"; what does that refer to with reference to this contract?

A. Bireley's being able to produce either the hot concentrate or the frozen, both were covered in the same contract, so on page 2 is frozen concentrated

(Testimony of James A. Finley.)

orange juice, and we pay them so much per gallon for producing that. When I say "we," I mean Exchange Orange Products Company.

Q. Was any frozen concentrate processed for Exchange Orange by General Foods under this contract, to your knowledge?

A. In 1951 there was.

Q. Do you know whether General Foods had any cold storage facilities at its plant for storing this frozen concentrate?

A. They had a small amount of frozen storage space available. Whether they owned it themselves or whether they are located right next to a storage place, I don't remember, but they had it available. But it was a limited quantity.

Q. All of the frozen concentrate processed by General Foods under this contract, Exhibit 18, was stored at places other than the storage warehouse of General Foods, was it not? [488]

A. I think they had enough storage space there for about one or two or three days' operation, and then we agreed to take it away and put it in outside storage, some of it going as far as Long Beach and clear to Claremont.

Q. And payments were made to General Foods under this contract in the same manner and time duration as in the previous contracts we have discussed for the services rendered by General Foods in processing the frozen concentrate for Exchange Orange? A. Yes, it was.

Q. And this contract provided for payment to

(Testimony of James A. Finley.)

General Foods of overhead expenses and a reasonable profit, did it not, to General Foods?

A. That was a negotiated price, which frozen concentrate being a very new item, and there was to be paid 33 cents per dozen for producing it, that price was developed by negotiations with General Foods, and that is the same price which they were paying other places that they were buying concentrate from. We hadn't produced enough of it to get it that accurate. But it was a negotiated price, and it includes a reasonable profit. [489]

* * *

Mr. Dixon: Plaintiff offers in evidence Exhibit 19, the same being a contract or document entitled Frozen Orange Concentrate Processing Contract between Hart's Fruit Products Company and Exchange Orange Products Company, bearing the date July 23, 1951.

Mr. Hurd: If the court please, may I inquire? This is offered for general background purposes, and not on the basis of itself being a cause of action?

Mr. Dixon: Surely.

Mr. Hurd: No objection.

The Court: Received in evidence, Exhibit 19.

* * *

Q. (By Mr. Dixon): Will you state to the jury, Mr. Finley, what Hart's Fruit Products Company is?

A. Hart's Fruit Products Company was a——

Q. You say "was"; may I interrupt you. Do you mean it isn't in existence now?

(Testimony of James A. Finley.)

A. It is in existence now under the name of Brea Valley. It has changed names since then. But in 1951 it was going under the name of Hart's Fruit Products Company. It is located at Brea. It started in originally as a single-strength processor on orange and grapefruit, possibly some [490] lemon. In about 1950 they bought a low temp evaporator to go into frozen. They were having financial difficulties about '50, the end of that year, after they put it in, and approached me, and for the year 1951 I think all they ran was frozen concentrate. [491]

Q. They were not a processor of single-strength juice? A. Not in 1951, to my knowledge.

Q. This is a contract that is like the Mission Dry, Hyland-Stanford and General Foods contracts, whereby those companies processed oranges into pasteurized concentrates for Exchange Orange?

A. More similar to the General Foods contract for producing frozen orange concentrate.

Q. I am sorry. I left that one out.

The Court: For——

The Witness: Frozen orange concentrate.

The Court: For Exchange Orange?

The Witness: For Exchange Orange. Not hot concentrate.

Q. (By Mr. Dixon): And this contract also provided that Hart's should have a profit on this operation, did it not?

A. I will have to glance at it. I haven't seen it since 1951.

(Testimony of James A. Finley.)

Mr. Dixon: Perhaps I can read into the record then from paragraph 3 the following:

"33 cent rate per dozen does not include sugar, if necessary, cans or cartons, as these items are to be supplied by supplier; it does, however, cover all cost to the processor from the time the fruit arrives at the plant until the product is in sharp freezer, plus a profit for [492] processing."

Q. In other words, Mr. Finley, under this arrangement the 33 cent rate was the processing—withdraw that.

The 33 cent rate per dozen cans of frozen concentrate was the amount paid to Harts for processing the fruit, that is the oranges which Exchange Orange or Sunkist delivered to it under this contract, is that right?

A. That's right, 33 cents a dozen.

Q. And Harts were paid on a weekly basis for such processing services, the same as payments were made under the Hyland-Stanford, Mission Dry and General Foods contracts?

A. Yes. It was paid on a weekly basis, and they even went so far as to drive to Ontario to pick up the checks.

Q. So that to summarize these contracts, Exchange Orange had so-called orange concentrate processing contracts with Hyland-Stanford, Mission Dry, General Foods and Harts Food Products Company; that Harts Food Products Company and General Foods processed frozen concentrate, orange concentrate, for Exchange Orange, and the other two

(Testimony of James A. Finley.)

companies, Mission Dry and Hyland-Stanford, processed this pasteurized orange concentrate that you have heretofore described.

Is that a fair summary?

A. That is correct.

Mr. Hurd: Pardon me. I think there should be added to that Bireleys also processed the hot concentrate. I believe that was omitted. [493]

The Court: Well, that's General Foods.

Mr. Hurd: General Foods, yes.

Mr. Dixon: I thought I said that.

Mr. Hurd: I think that was omitted.

The Court: If it was, it is now supplied. I thought General Foods was mentioned.

The one contract, 16, was a different kind of a contract. That was a contract whereby Orange supplied lemons——

The Witness: Supplied oranges.

The Court: ——supplied oranges to Hyland so that Hyland might make a hot concentrate for their own use.

The Witness: That is correct.

* * *

Mr. Dixon: Plaintiff's 20 is offered in evidence.

Mr. Hurd: No objection.

The Court: Exhibit 20 received in evidence.

* * *

Q. (By Mr. Dixon): Now, among the types of orange citrus juice products that Exchange Orange was processing was single-strength [494] Valencia orange juice, was it not?

(Testimony of James A. Finley.)

A. Will you repeat the question?

(Question read.)

A. That is correct.

Q. The single-strength orange juice which Exchange Orange processes it cans, of course, and that product then is sold in interstate commerce, is it, by Sunkist? A. Yes, it is.

Q. In the various states of the United States?

A. That's right.

Q. During 1951, Exchange Orange processed some single-strength orange juice that was sold under the Exchange label and also under the Sunkist label, did it not? A. That is correct.

Q. Now, was there any difference in the actual product that went out under the two labels, or was it a difference in name or label?

A. We packed the Exchange label a little earlier in the season. We waited for full maturity of the fruit, full flavor, and the acid going down to a minimum, before we packed Sunkist. I would say the Sunkist was slightly higher quality than—the fruit was the same quality, but the Exchange product was just a little higher acid content than Sunkist.

Q. Would that be anything that the average consumer [495] or drinker of this orange juice would recognize as a factor?

A. Frankly, I am not a consumer.

Q. I assume you probably drink a lot of orange juice out at Exchange Orange?

A. To one who is trained and critical, there is a

(Testimony of James A. Finley.)

difference, but to the untrained, I would say there would be very little difference.

Q. If I were to go into a grocery store and see on the shelf some orange juice with a Sunkist label on it and some with the Exchange label on it and did not know the difference, would there be in fact any difference between the juice I would get out of either can if I bought one of each?

A. Exchange label in the year 1951, you would have had juice that was produced in June. In Sunkist the fruit matured at a point—I don't think we started up until the latter part of July. It is a little better flavor.

Q. I know you are a connoisseur, probably, of orange juice. I am talking about a housewife or just myself or someone who bought a can. Would I be able to tell any difference between the two?

A. I can't taste for you

Q. Well, you are an expert in the field. Did your marketing department ever run any surveys on that point? A. No.

Q. Now, you also put out some of this orange juice, [496] single-strength Valencia juice, that is sold to other marketers of single-strength orange juice, do you not? A. Yes, we do.

Q. That is what is called a private label product, but it is one that is manufactured or processed by Sunkist and sold to the buyer who has his label put on that can which bears the orange juice processed by Exchange Orange, shall we say?

A. That was our type of business up to 1951.

(Testimony of James A. Finley.)

But I don't remember whether we did any of that type of business in 1951 or not. If it was, it was very small.

Q. You did offer, did you not——

A. We offered it, but how much business we did, I don't know.

Q. That type of orange juice processing by you is what is called shiny or unlabeled?

A. Bright stock.

Q. Yes, bright stock. The buyer then would tell you, Exchange Orange, to put "my label" on. Let's assume, maybe it is Ana-Gold he wants on that particular can. You would sell the bright stock and put the label on the can as the label of the purchaser, the Ana-Gold label on the can to the purchaser, would you not?

A. We would put the purchaser's label on.

Q. And the juice then would be the same juice as that [497] that went out under the Sunkist label, would it, or the Exchange label?

A. Some buyers would ask for samples first. We would block off 2,000 or 5,000 cases, take a sample of it, and send them a sample, and they would say to put their label on it. Others would send the label in and tell you to put it on anything.

Q. In processing this orange juice, do you have vats, or wherever it is stored, in which you pour the orange juice that is supposed to be available under the Exchange label, and then that under which the Sunkist product goes, and another one for the bright stock buyer? A. No.

(Testimony of James A. Finley.)

Q. Or is it all put into one container?

A. We run one type of product at a time.

Q. So that any one time if anyone wanted to buy Exchange orange juice, single-strength Valencia juice, or if they wanted to buy the unlabeled or bright stock, as you call it, that orange juice would come from the—might well come from the same vat, might it not, or storage tank?

A. It might, yes.

Q. It might also come from the same one in which Sunkist orange juice was being labeled, might it not? A. It could.

Q. Now, directing your attention to TreeSweet Products [498] Company, have you ever heard of that company?

A. Yes. That is the concern down in Santa Ana, TreeSweet Products Company. They have got a very good reputation.

Q. Well, I don't doubt that, Mr. Finley. They are located in the same town or city in which the Exchange Orange plant is located?

A. Exchange Orange plant is located in Ontario and TreeSweet Products plant is at Santa Ana.

Q. I don't suppose it makes much difference. They are close together.

A. It is just about a triangle from Los Angeles, about 35 miles.

Q. As a matter of fact, most of the processing plants, whether they are Exchange Orange or TreeSweet or any other independent processor, are all located in the Anaheim-Ontario——

(Testimony of James A. Finley.)

A. Los Angeles

Q. ——Orange County area, are they not?

A. And Los Angeles and Hollywood. There is a lemon plant that is up in Ventura, and an orange plant in San Fernando.

Q. But most of the facilities for processing oranges into orange juice products are in the Santa Ana-Ontario-Orange County area, are they not?

A. That's right.

Q. And TreeSweet is located there, too?

A. They are located in Santa Ana in the Orange County area. [499]

Q. Do you know whether Winckler & Smith Company had a plant in that area, too?

A. Winckler & Smith had a plant at Anaheim.

Q. TreeSweet produces primarily single-strength Valencia orange juice, does it not, at its plant in the Santa Ana area?

A. It produces the Valencia orange juice and a quantity of single-strength lemon juice.

Q. And those are the two products that it processes at its plant?

A. Those are the only two products that I know of.

Q. Its principal product, however, is single-strength Valencia orange juice, is it not? If you don't know, you may state so.

A. It is either orange or lemon.

Q. Do you know what label it puts on its single-strength Valencia juice when it puts it out for sale to the consumer in various states of the United States?

(Testimony of James A. Finley.)

A. I think most of it goes under the TreeSweet label.

Q. Exchange Orange has no interest—by that I mean doesn't have any financial interest—does it, in TreeSweet Products Company?

A. It does not.

Q. Does Sunkist have any financial interest in TreeSweet Products Company? [500]

A. I am sure it does not.

Q. Is it fair to refer to TreeSweet Products Company as an independent processor, in the sense that it doesn't have any access to orange groves that it owns or controls as a source of supply for oranges that it processes? A. That is correct.

Q. So that it would depend upon the supplier or whatever source it could get oranges from, I presume, for processing its single-strength Valencia juice at its Santa Ana plant? A. That is correct.

Q. The single-strength Valencia orange juice that TreeSweet sells, is that sold in competition with the Exchange and Sunkist labeled single-strength Valencia orange juice?

A. It is sold in the same markets and in competition.

Q. That is in the various states of the United States, as well as the state of California?

A. Yes.

Q. So that if a buyer of single-strength Valencia orange juice went into a store in, shall we say, Chicago, they might find there on the shelves of a grocer

(Testimony of James A. Finley.)

both Sunkist Valencia orange juice and TreeSweet Valencia orange juice?

A. That is possible. [501]

Q. Mr. Finley, I believe we have heard from Mr. Kelly in this case testimony to the effect that a ton of Valencia oranges costing $40 a ton would produce an average of 100 gallons of single-strength Valencia orange juice, that ton purchased at $40 being 120 solids soluble content, I believe is the term he used. Now, the oranges that you process at the Exchange Orange plant with a 120 pound soluble content, if you had to pay for it, would produce about 100 gallons of single-strength orange juice, would it not?

I realize it might vary a gallon or so.

A. Your solids per ton depends probably more upon the Brix of the orange juice than it does on the number of gallons per ton, but for rough figuring I would say your statement is right.

Q. So that if anybody who didn't have to pay for the oranges got them under some arrangement, they would get 100 gallons, approximately, of single-strength orange juice from a ton of oranges that cost $40, is that correct?

A. That is approximately correct.

Q. Now, are you familiar with the costs—by "costs" I mean the manufacturing costs and overhead costs—included in that item for processing a ton of 120 solids Valencia oranges into the 100 gallons of single-strength Valencia juice?

A. I never heard of anyone keeping costs by

(Testimony of James A. Finley.)

tons. [502] Costs are usually kept on a case basis, so much per case, not a per ton basis. At least we never have, and I never heard of anybody else. We can multiply it out easily if you have your figures that way.

Q. I don't know much about this business, Mr. Finley, so I am just trying to see whether it can be dealt with on a tonnage basis, rather than on some of these case bases. By the way, do you have a good many sized cases of orange juice?

A. There are two sizes, primarily. The 46 ounce family size, and the No. 2, which is the 18 ounce size. And then there is a smaller percentage put up in 12 ounce, and some put up in 6 ounce, single strength. A very small percentage.

The Court: Can you compute it out on the ton basis? Not now, because we are almost at noon time.

The Witness: Permit me to bring my slide rule. All you have to do is multiply the per case cost by approximately 23, and that gives the per ton cost.

The Court: Well, that is a certain sized case, I take it?

The Witness: That is a 46 ounce case, which is 80 per cent of the pack.

Q. (By Mr. Dixon): My figures are 4 gallons and approximately a third. The figure I have is 4.312 gallons in each case of 12/46 ounce cans of single-strength Valencia orange juice. [503]

A. Twelve 46 ounce cans?

The Court: Is that correct, the figure of 4.312 gallons?

(Testimony of James A. Finley.)

The Witness: That is correct. I think there is a five on it. 4.3 is the figure I use.

Q. (By Mr. Dixon): Is it a fair statement, Mr. Finley, to say, based upon your knowledge and experience, that in processing oranges into single-strength juice, that the average cost of processing a ton of single-strength Valencia juice would be about from $30 to $35 a ton?

A. May I have a piece of paper, please?

The Court: Here is a pad.

The Witness: It is between $30 and $35 a ton.

* * *

Q. May it please the court. If I recall, Mr. Finley, when we adjourned for lunch we were talking something about manufacturing costs, discussing the various number of gallons, and so forth, of orange juice that were produced from the average ton of Valencia oranges. I believe you mentioned something about 12/46s as being the standard can. I am not sure the jury understands what that is. Will you tell them, please?

A. 12 46-ounce cans or 4.3 gallons is probably 80 per cent of the pack of oranges and grapefruit. That is the family size can. The Government figures—well, 10 or 15 years ago, the popular size used to be the 18 ounce, 24 No. 2s, so all cans were converted into that one size for comparative purposes, and even now the 12/46s are converted No. 2s. So it is about 80 per cent of the pack, 75 to 80 per cent of the pack is in the larger size can. [505]

(Testimony of James A. Finley.)

Q. If I understand correctly, then, 23 cases of 12/46s would be the usual number of cases that would be produced from the average ton of Valencia oranges?

A. If we call the average for Valencia oranges 100 gallons to the ton, and you divide it 4.31, it comes out approximately 23 cases per ton.

Q. I think you indicated you could more easily express the manufacturing costs per ton of single-strength Valencia orange juice if you computed it from the 12/46 ounce can cost. Now, if that is any easier for you, can you indicate to the jury what the manufacturing cost for processing a ton of Valencia oranges in single-strength juice under the case method would be?

A. To take the average price would depend on the size of the pack, but around $1.35 per case of 12/46 ounce cans.

The Court: $1.35?

The Witness: Yes. [506]

Q. (By Mr. Dixon): Is that the Exchange Orange manufacturing cost? I mean according to the best of your recollection.

A. Depending upon the size of the pack, that is about the cost.

The Court: Size of the pack, by that you mean the number of cases that you are making?

The Witness: Yes, per year.

If you making 500,000 cases, your cost would be one figure; if you are making 200,000 cases a year, it would be another figure.

(Testimony of James A. Finley.)

The Court: Go ahead.

Q. (By Mr. Dixon): Is that difference in cost explained, if there is a difference, because of the fact that overhead is a constant factor in the processing business?

A. Your overhead figure, taxes, insurance, depreciation, are constant factors.

Q. Of course, if you didn't run any single-strength juice and had an overhead—if you ran one case, let's say, of 12/46s, the manufacturing cost of that one case would be astronomical, relatively speaking, would it not?

A. It would be all your overheads, plus the cost of the cans and the case on that one case. It would be a pretty high figure.

Q. So when we are referring to this figure that you [507] mention of $1.35 for manufacturing cost per case, you are assuming of course that there is at least an average, shall we say, use made of the processing facilities that are available to you for that purpose?

A. Yes, sir, that is an average figure.

Q. Mr. Finley, I am not sure whether I have asked you this question, but if I didn't, I intended to: As I recall it, most of the processing facilities of Exchange Orange in 1951 were being utilized for frozen juice products, is that correct?

A. Well, both frozen and single strength take juicing equipment. You have one room—after it leaves that juice room it goes to the room where we

(Testimony of James A. Finley.)

can out single strength. If we are making frozen, it goes to another room where we are making frozen. So we can make both at the same time, although we cannot and didn't have in '51 enough juicing capacity to run both rooms to full capacity.

The Court: Well, the question was, I take it, what proportion of your production in '51 was frozen concentrate and what proportion was single strength.

Was that the question?

Mr. Dixon: Yes.

The Witness: It was predominantly frozen concentrate.

Q. (By Mr. Dixon): Was Exchange Orange in 1951 on the look-out for, shall we say, plant capacity for processing [508] single-strength Valencia orange juice because of this situation that you have mentioned?

A. Yes, sir, we looked for single-strength operators, as well.

Q. Who were the processing companies that were in 1951 primarily processing, to your knowledge, single-strength Valencia orange juice?

A. Case-Swayne, TreeSweet, Silzle, Winckler-Smith had equipment for——

Q. I didn't get the last name.

A. Winckler-Smith, and then ourselves, Exchange Orange. And the Exchange Lemon was putting in equipment for frozen lemon—not frozen lemon, but single-strength lemon, and the same equipment is used.

(Testimony of James A. Finley.)

Q. Mr. Finley, you mentioned the Silzle Company; was the Silzle Company selling single-strength orange juice in interstate markets, that is, in the various states of the United States, to your knowledge, in 1951? A. Yes.

Q. And was that product being sold by Silzle in competition with the product of Exchange Orange, either under the Exchange label or the Sunkist label?

A. It sold in the same markets and competitive.

Q. Directing your attention to the TreeSweet Company and the year 1951, did your company, that is Exchange Orange, [509] have any contract or arrangement of any kind with that company pursuant to which either Sunkist or Exchange Orange made oranges available to TreeSweet for processing into single-strength Valencia orange juice?

A. Had arrangements with TreeSweet from late in the season 1947 up to and through 1951. [510]

Q. You mean there had been an arrangement with TreeSweet for several years prior to 1951?

A. Yes.

Q. And that arrangement was in contractual form, was it, written form? A. Yes.

Q. During all that period of time? A. Yes.

Q. Before any written contract was entered into between Exchange Orange and TreeSweet in 1951, with whom did you discuss such a contract within the Exchange Orange Company?

A. Within Exchange Orange or Sunkist?

Q. Yes. A. Or just Exchange Orange?

(Testimony of James A. Finley.)

Q. You can include Sunkist, too, yes.

A. That contract, the first I heard of it was a discussion that originated, I think, with Sam Kelly. It was a suggestion to get around a problem.

Q. You mean that Mr. Kelly of Sunkist suggested to you that Exchange Orange enter into some kind of an arrangement with TreeSweet in 1951?

A. No.

Q. Under which TreeSweet could secure oranges?

A. No. 1947.

Q. I am sorry. I am now talking about 1951. Did you [511] have any discussion with him?

A. No.

Q. Did you discuss the arrangement, if any, that you made in 1951 with TreeSweet with anyone outside—I mean anyone in Exchange Orange before that arrangement was made?

A. No. The size of the crop was such that we decided——

Q. I am sorry. My question is, did you discuss any arrangement with anyone before you made it in Exchange Orange?

A. Not in Exchange Orange.

Q. All right. Did you discuss it with anyone in Sunkist? A. Yes.

Q. With whom?

A. Discussed the advisability of having a contract with Sam Kelly and with Fran Wilcox.

Q. When, if you recall, did those discussions take place?

A. I don't remember the exact dates on it, but

(Testimony of James A. Finley.)

they occurred very early in that year, because at that time we knew the size of the crop and knew that we would have to have all facilities operating. As to any dates, I don't know.

Q. What, if anything, did Mr. Wilcox and Mr. Kelly say to you with reference to entering into an arrangement with TreeSweet in 1951?

A. They thought it advisable to make arrangements to, you know, process all the fruit available and to do that I [512] figured I would need some single-strength juice operators.

Q. In these discussions, was there anything said by Mr. Kelly concerning the price at which any oranges would be made available to TreeSweet under any arrangement in 1951? A. No.

Q. You mean price wasn't even discussed?

A. Price wasn't discussed with Kelly and myself.

Q. Did you discuss price with Mr. Wilcox?

A. Regarding the price to TreeSweet?

Q. Yes. A. No.

Q. Was there any discussion concerning the terms of any arrangement that should be entered into with TreeSweet in 1951 and Exchange Orange which would enable TreeSweet to secure Valencia oranges for processing into single-strength juice in 1951?

A. Terms were not discussed and wouldn't have been discussed because we had previous arrangements, and it was assumed that the same arrange-

(Testimony of James A. Finley.)

ments would be carried on, so there would be no need of discussing, you know, figures.

Q. Then I take it, Mr. Finley, that you were given carte blanche by Mr. Kelly and Mr. Wilcox to enter into the same type of arrangement, shall we say, with TreeSweet in 1951 as you had had in previous years? A. Well, I—— [513]

Q. Do you understand what I mean by carte blanche? A. No.

Q. Unrestricted discretion.

A. The authority to make a contract like that would not come from Kelly and Wilcox. It would come from members of my board. So they might agree with it and back it up, but I would still have to get approval from somebody else. It would be their suggestion or advice.

Q. Did you ever present a proposed contract between Exchange Orange and TreeSweet for the approval of the board of directors of Exchange Orange in 1951?

A. Not the contract, no. That is an administrative matter.

Mr. Dixon: Counsel, may it be stipulated that a request was made for the production of any minutes of Exchange Orange of the board of directors or of the executive committee of that company which would indicate any action or discussion ever having been taken by the board of directors or the executive committee of Exchange Orange on any arrangement between Exchange Orange and TreeSweet in 1951 pursuant to which TreeSweet would acquire oranges

(Testimony of James A. Finley.)

for processing into single-strength orange juice or any other citrus juice product?

Mr. Hurd: That is correct, and there were not minutes dealing with the particular contract to which you are referring. [514]

Q. (By Mr. Dixon): But Exchange Orange did enter into a contract with TreeSweet in 1951, did it not, Mr. Finley, pursuant to which TreeSweet did secure Valencia oranges for processing into single-strength Valencia juice? A. We did.

Q. Directing your attention, Mr. Finley, to Plaintiff's Exhibit 20, did Exchange Orange make any Valencia oranges available to TreeSweet for processing into single-strength Valencia juice under that contract in 1951? A. Yes, it did.

Q. It is a fact, is it not, that in excess of 24,000 tons of Valencia oranges were made available to TreeSweet by Exchange Orange or Sunkist under that contract?

A. I don't know the exact figure, but it was approximately that figure, over 20,000 tons as I remember it.

Mr. Dixon: Just so the record may show at this time, I think counsel will agree that it is already in evidence that the amount, Mr. Finley, was in excess of 24,000 tons.

Is that correct, counsel?

Mr. Williams: 24,148.

Q. (By Mr. Dixon): Will you state to the jury, if you can, from this contract how TreeSweet paid,

(Testimony of James A. Finley.)

if it did, for any oranges delivered to it under that contract for processing into single-strength juice?

A. This contract covers TreeSweet producing for the [515] Exchange Orange Products Company a single-strength juice at their represented cost with the Exchange Orange Products Company furnishing the fruit to make the juice, Exchange Orange Products Company taking, also, the oil and peel for dried meal. After it was produced, then the TreeSweet Company bought the finished product cased from Sunkist for the then going price of our products.

So we hired them to make it for our account and then sold it back to them at our regular price, less discounts of brokerage, allowances which are common in the trade, which we would have to give in the case of our own sales, plus an operating profit. And we got paid, really, for the oranges on the difference between those two prices.

Q. I don't presume that you have figured, Mr. Finley, the actual amount that Exchange Orange received per ton after all of these various transactions had been made between Exchange Orange and TreeSweet, while this contract was in effect, have you?

A. No, I havn't. It is the addition of the juice, oil and meal that is sold over a period of time.

Q. Would you say that it was around about 12 to 15 or 16 dollars a ton? Is that a fair estimate? I am not asking you now to be specific. I am just asking you to approximate it if you can.

A. Some lots may have been sold that low, but I

(Testimony of James A. Finley.)

would [516] venture to guess that the total contract was somewhat higher than that, but as to how much——

Q. Approximately, can you indicate? Or if you can't, don't hesitate to say so.

A. Well, I can't.

Q. I am sorry?

A. I can't. It would be higher than that, but I don't know how much.

Q. So that under this contract with TreeSweet, Exhibit 20, TreeSweet was paid, was it not, on a weekly basis according to the manufacturing costs, plus a manufacturing profit, for the processing of the oranges it received thereunder as this contract went into effect?

I direct your attention, Mr. Finley, if you are having difficulty finding it, to paragraph 3. It will be the third page of the exhibit as it is presented to you.

A. The reason that I was looking for that particular paragraph, it is in the contract that we pay for it on a weekly basis. That was the agreement. But we did not do it that way. [517]

Q. Yes, I understand. A. All right.

Q. After TreeSweet got processing under this contract, it sold the juice it canned and processed, did it not, on its own account under its own label?

A. Yes.

Q. None of this juice that was processed under this contract was ever sold by Sunkist or Exchange

(Testimony of James A. Finley.)

Orange under a Sunkist or Exchange Orange label, was it, Mr. Finley?

A. Practically all of it was sold, if not all, sold under a TreeSweet label, although the contract is about a four-year contract, and I remember one or two years that we did get some and it was packaged on the Exchange label, but in 1951, I don't remember.

Q. It is a fact, then, is it not, that the entire production under the TreeSweet 1951 contract, Plaintiff's Exhibit 20, was sold under the TreeSweet label?

A. I would say as nearly as I can remember practically all of it was sold under that label.

The Court: Sold under that label and sold by TreeSweet?

The Witness: And sold by TreeSweet.

Q. (By Mr. Dixon): And as TreeSweet sold the oranges processed by it under this contract, it remitted or paid Sunkist or Exchange Orange for the juice so processed by TreeSweet on the basis of the then prevailing Sunkist selling [518] price for Sunkist Valencia orange juice less certain specified discounts, did it not? A. That's right.

Q. So that if TreeSweet would process, let us say, a thousand tons of Valencia oranges during the week, more or less, taking that as a figure, and process that 1,000 tons into single-strength Valencia juice, in cans furnished by TreeSweet, and sold that juice under the TreeSweet label, they would then remit to Exchange Orange the price for that product

(Testimony of James A. Finley.)

based upon the method that I have just suggested which appears in the contract, and at the same time, if TreeSweet had any money coming to it from Sunkist during that week in which the sale was made for processing those oranges, the actual amount which TreeSweet would then remit, if any, to Sunkist would be the difference between the amount due that week to TreeSweet for processing the oranges under the contract on a certain basis provided for in the contract, and the amount that TreeSweet owed Exchange Orange for the canned juice which it had sold during that week, the price being paid by TreeSweet being determined under the contract with the selling price of Sunkist less the discount mentioned?

I realize that is a long and involved question, Mr. Finley. Do you understand the question?

A. Yes.

Q. Well, is that a fact? [519]

A. That is the way it was worked.

The Court: Well, I saw one juror shaking his head.

Mr. Dixon: I could put it in simpler language, but I don't know how I can without putting words in the witness' mouth.

The Court: Can I explain the contract? I will try it and see if I do any better.

Under this contract, Exhibit 20, between TreeSweet and Orange, Exchange Orange, Exchange Orange made available to TreeSweet oranges to be made into juice, and the contract provided that this

(Testimony of James A. Finley.)

juice should remain the property of Exchange Orange until such time as TreeSweet purchased it. So to start with the oranges went from Exchange Orange to TreeSweet. TreeSweet made them into juice. But the contract provided that was Exchange Orange's juice so far.

In the meanwhile, TreeSweet was paid by Exchange Orange or was to be paid—I am not talking about when the money passed—was to be paid a certain amount for processing oranges into juice. TreeSweet had a right to buy this canned juice from Exchange Orange, and so it bought the canned juice in case lots from Exchange Orange at the Sunkist price—or I guess you would call it the Sunkist price less certain discounts which we have only heard generally about, and was to pay Exchange Orange then for the number of cases that it bought. [520]

The evidence shows that substantially the entire 1951 production made by TreeSweet under this contract was bought by TreeSweet on that basis. [521]

As a result of these two parts of the contract there would be credits going each way. TreeSweet would have money coming to it from Exchange Orange for doing the processing, but when it sold the cases it would owe Exchange Orange for the cases.

I don't know. I assume that there were bookkeeping entries.

Mr. Hurd: I think that is true. I think as TreeSweet sold, it paid Exchange Orange for the juice, less what it had coming for doing the processing.

The Court: All right.

(Testimony of James A. Finley.)

Now, do you think you understand this transaction?

All right.

Q. (By Mr. Dixon): So that oranges were then made available to TreeSweet under this contract, Exhibit 20, pursuant to which it did not pay anything for any of the oranges, it paid only for the juice processed thereunder, and then only when sold; is that correct?

A. That is correct, just the juice portion.

Q. Now, directing your attention to Schedule 1 of Exhibit 20, Mr. Finley, and particularly the column 12/46 ounce heading——

A. What page is that?

Q. This is Schedule No. 1.

A. I see it. [522]

Q. That schedule deals with the costs, that is the manufacturing costs, to be paid to TreeSweet by Exchange Orange under the per case system that you mentioned a few minutes ago: is that correct?

A. That's right.

Q. Now, by referring to the column under the 12/46 ounce schedule, I notice there is a line drawn through or under the sixth figure.

I am sorry, ladies and gentlemen of the jury, that I have to be this specific. You will have the contract with you, but at this time this is the only way that I can identify what I am talking about.

Will you indicate to the jury what that line means, if anything?

A. I don't think that line means anything. It

(Testimony of James A. Finley.)

could have been put at any other place and meant just as much. I don't know the meaning of it.

Q. I don't, either, and I was just curious as to whether it had any particular meaning.

Mr. Hurd: I will say for the record we don't, either, Judge.

The Witness: It is sort of the mid point or a guess, and it is put in there.

The Court: The line that they are talking about here is on a very detailed set of figures. There is a line between [523] certain columns, and that is what they are talking about.

Q. (By Mr. Dixon): I venture this suggested explanation, Mr. Finley. I am not much of a mathematician, but by taking the figure 1.41, which is just above that line, and multiplying it by 23 cases, I get a figure of approximately 32 or 33 dollars. Is that in your judgment a fair cost, manufacturing cost, with profit, for manufacturing a ton—the average ton, rather—of Valencia oranges into 23 cases of size 12/46 ounces?

A. If the pack as drawn by that line carries out to 1.41, the cost would be about a dollar forty-one cents, but that does not include profit.

Q. You mean that under this contract there wasn't any manufacturing profit included in this item of cost?

A. There is no manufacturing profit.

Q. But the overhead of operating the plant, of course, was figured in that item, was it not?

A. The manufacturing overheads.

(Testimony of James A. Finley.)

Q. Was included? A. Yes.

Q. But no manufacturing profit?

A. You are right. [524]

* * *

Q. (By Mr. Dixon): Now, Mr. Finley, let's assume for the purpose of my question that the Sunkist selling price to any other buyer of orange juice, that is Valencia single-strength juice, was $2.20 a case for a case of 12/46 ounce cans—and I might say to the jury this figure 12 means 12 cans of 46-ounce size. Can you tell the jury under this contract what TreeSweet would pay Exchange Orange for any juice, that is, for a can of 12/46s that it purchased or otherwise acquired from Exchange Orange under this contract?

The Court: You mean a can or a case?

Mr. Dixon: I am sorry. I mean a case, yes, Judge.

The Witness: Following the contract, that could be figured.

Q. (By Mr. Dixon): First you take off 15 per cent, do you not?

A. That's right. That is 33 cents.

Q. Which, I am a poor mathematician, but I understand is about 30 cents? A. 33 cents.

Q. 33 cents, I am told. Then to that we add the 6½ cents label allowance.

A. You don't add to it. It is less 6½ cents.

(Testimony of James A. Finley.)

The Court: It depends on what you are talking about. Are you adding discounts together? [526]

Mr. Dixon: That is the purpose, your Honor.

The Court: That is what he means, so you get the total discount.

The Witness: You add it to the discount, yes.

The Court: What was that figure?

Mr. Dixon: Six and a half cents.

Q. Then we add another 7 cents to this, do we not, under the provision which says less 7 cents per case regardless of size as advertising allowance?

A. That's right.

Q. That makes a total of 46½ cents, if I compute the figures correctly, to be deducted from $2.20, or an actual amount of $1.73½, which is paid for the case of 12/46s.

The Court: Is that correct?

The Witness: That's right.

The Court: Speak up. Let me inquire, where do we get the $2.20? You say assume that.

Mr. Dixon: Your Honor, we are prepared to place in evidence at a later date the actual price list of Sunkist which entered into this.

The Court: This is a hypothetical question now, assuming $2.20?

Mr. Dixon: It is a hypothetical question, yes.

The Court: All right.

Mr. Dixon: The price varied during the season from [527] $2.20, I believe, up to $2.50 on the type of thing we are talking about here, and also on an-

(Testimony of James A. Finley.)

other price system from $2.50 to $2.80. So I am starting at the $2.20 price.

The Court: All right.

Q. (By Mr. Dixon): Now, if any other brokerage allowances or anything were given any other customer, they would be added to this price, would they, Mr. Finley, under the contract?

A. That is according to the contract.

The Court: Do you mean what you said?

Mr. Dixon: Would be deducted. I am sorry. Would be deducted from this $2.20 price.

Q. Your answer is yes, is that correct?

A. Yes.

Q. Now, I notice, Mr. Finley, that this allowance of 7 cents is made for advertising purposes. Did TreeSweet ever advertise any of the Sunkist products under this contract?

A. No. They advertised their own TreeSweet label.

Q. What is meant by advertised allowance? Will you explain that to the jury?

A. We had allocated that year 7 cents per case for advertising Sunkist. We felt that if we sold this to another concern, they should be permitted to use that same 7 cents advertising their own brand, if they wanted to. If they [528] didn't want to, that was all right, but that is how much it cost us to advertise our own brand. TreeSweet was an advertised brand and whether they used it or not I will never know.

Q. Do you know whether your price lists that

(Testimony of James A. Finley.)

were circulated to the trade provided for a 7 cents per case advertising allowance to any purchaser that might buy your juice?

A. Could be on private label, but if you are selling Sunkist, the Sunkist organization is the one that spends the 7 cents, and you don't allow anyone money for it because you spend it yourself.

Q. That is the thing I don't understand, Mr. Finley, as to why TreeSweet was given this 7 cents per case advertising allowance unless they were advertising something for Sunkist.

A. It cost about 7 cents a case to advertise your own brand. We were advertising Sunkist and it permitted him to advertise TreeSweet. He would have to get his money from some place, and we spent that much on advertising, or it was allocated for it.

Q. My question is again, Mr. Finley, when you circulated a price list of Sunkist to the trade, when anyone else would be buying unlabeled juice, did you give that purchaser a 7 cents per case advertising allowance? [529]

A. The Exchange brand is a non-advertised brand, and the price is 7 cents less.

Q. Will you answer my question? Did you or did you not, if you know?

The Court: Wait a minute. The question is on unlabeled use?

Mr. Dixon: Correct.

The Court: Which you call bright, is that it?

(Testimony of James A. Finley.)

Mr. Dixon: Correct.

The Court: Now, that is the question. When you sold bright juice or unlabeled juice.

The Witness: I don't know what our price list was at that time.

Q. (By Mr. Dixon): Are you familiar with the price structure or, generally speaking, the composition of your pricing system in 1951 as set forth in your price schedule circulated to the trade?

A. I am familiar with them at the time, but my memory isn't that good.

Q. Maybe my question isn't a fair one then. Let me ask you this. When you sell unlabeled product, single-strength juice, in a case of 12/46 to a purchaser who puts his own label on that juice and then sells it to a consumer or to a retailer or wholesaler, as the case may be, do you give that person or buyer a 7 cents per case advertising allowance? [530]

A. I don't remember whether we sold any of what you call bright stock in that year.

Q. Isn't it a fact, Mr. Finley, that the general purpose of giving an advertising allowance to a buyer is to enable that buyer to go out and set up the particular trade-marked product that he is selling and advertise it in the local store and in the fly sheets in the area in which the product is sold? Do you know what I mean by fly sheet? An advertising sheet circulated to the housewife containing a list of products that are being offered for

(Testimony of James A. Finley.)

sale at a certain price? Isn't that what is meant by an advertising allowance in the trade?

A. Well, I think an advertising allowance in the trade might be considered an allowance to the store operators to advertise in the newspapers, and they pick up the advertising bill, while this 7 cents advertising allowance here was for the purpose of Sunkist doing their own advertising in their own way. It can be spent, that 7 cents, if Sunkist wanted to, they could pass it on to the customer with the agreement that they go ahead and spend the 7 cents in their ads, co-operative advertising.

Q. I understand, but it is only given, is it not, to someone who is advertising the Sunkist label product?

A. When the Sunkist product is being sold, that's right. [531]

Q. And this wasn't being sold under the Sunkist label, was it? A. No.

Q. It was being sold to the trade under a Tree-Sweet label? A. As far as I know.

Q. Well, then, was Sunkist in fact subsidizing or paying TreeSweet to advertise and promote the TreeSweet label by giving it this allowance under the contract?

A. We weren't paying them for it. They could use that 7 cents for that purpose if they wanted to.

Q. I understand. I think you have answered my question. There was no obligation, however, for them to use this 7 cents per case to advertise Sunkist label

(Testimony of James A. Finley.)

products, was there? A. Why, no. [532]

* * *

Juror Johnstone: Didn't I hear Mr. Finley say that Exchange brand products sold for 7 cents a case less because it wasn't advertised, because they weren't spending that advertising?

The Court: Yes. In other words, Sunkist had two brands, one the Sunkist brand and one the Exchange brand. I understood him to say that—you sold your Exchange brand for 7 cents less?

The Witness: Than the Sunkist brand, yes.

The Court: You advertised both brands, though?

The Witness: No, we don't advertise the Exchange brand.

The Court: You don't advertise it at all?

The Witness: No. And since have discontinued it.

Mr. Dixon: Plaintiff's Exhibits 21 and 22 are offered in evidence.

Mr. Hurd: No objection.

The Court: Exhibits 21 and 22 received in evidence.

* * *

Q. (By Mr. Dixon): I will ask you to refer to Plaintiff's Exhibit 21, the same being a series of written documents dated July 27, August 3, August 16, 1949, and ask you, Mr. Finley, if those documents and that exhibit represent [533] the arrangement in effect between TreeSweet and Exchange Orange during the processing year 1949.

(Testimony of James A. Finley.)

A. Yes, it does.

The Court: That is Exhibit 21?

The Witness: 21.

Q. (By Mr. Dixon): And is the arrangement substantially the same under that contract as it was in Exhibit 20?

A. Substantially, the contract Exhibit 21 is the same as the 1951 contract, except that it does not allow for an advertising allowance, some of the prices are a little different, and it also allows for the addition of sugar.

* * *

Q. (By Mr. Dixon): I notice there wasn't any advertising allowance of 7 cents a case allowed in this contract, Mr. [534] Finley, and that there was one in the '51 contract. Can you explain to the jury why it appeared in the '51 contract and didn't in the '49 contract?

A. Well, the '51 contract was negotiated from those that started in in the season '47, the first contract, and we thought we made refinements or improvements as we went along. We did not advertise the Exchange brand to any degree. And in '51, coming out with the Sunkist brand figuring on advertising it, and backing it up with advertising, we budgeted 7 cents per case for advertising, and felt if we were willing to back up our Sunkist name with 7 cents allowance for advertising, why, he should be entitled to the same thing, so it was put in the '51 contract.

Q. Was this to be kind of a joint advertising

(Testimony of James A. Finley.)

effort for Sunkist and TreeSweet Valencia single-strength orange juice throughout the country?

A. No. It was to be, you might say, a competitive advertising program. He was going to advertise TreeSweet and we were going to advertise Sunkist.

Q. I don't believe there was any advertising allowance provided for in Exhibit 22, that is the 1950 arrangement; is that correct?

A. That is correct. [535]

* * *

Q. (By Mr. Dixon): Exchange Orange or Sunkist did make oranges available to TreeSweet in both the years '49 and '50 under these two contracts, Exhibits 21 and 22, did they not, Mr. Finley? A. It did.

Q. And TreeSweet did purchase from Sunkist all of their requirements and all of the juice which it processed from oranges delivered to it by Sunkist under those contracts in the years 1949 and '50, did it not?

A. It purchased all of the fruit—rather, all of the juice packed by it from Exchange fruit in the years '49 and '50. As to whether he ran additional fruit or not, I don't know.

I don't know whether that was in your question. [536]

Q. I don't know, either, Mr. Finley, whether they did or didn't.

Then, these three contracts, Exhibits 20, 21, and

(Testimony of James A. Finley.)

22, represent the working arrangement between Sunkist and Exchange Orange—I mean Sunkist and TreeSweet—during the years '49, '50 and '51, do they?

A. Those contracts cover the sale of juice to the TreeSweet Products Company under these contracts. [537]

* * *

Mr. Dixon: Plaintiff's Exhibits 23 and 24 offered in evidence.

Mr. Hurd: No objection.

The Court: Exhibits 23 and 24 received in evidence. [538]

* * *

Q. Now, under the 1950 contract, Mr. Finley, all of the juice that was on hand on February 1, 1951, was to be purchased by TreeSweet at the Sunkist selling price for the particular inventory then on hand, was it not? A. That's right.

Q. By selling price I mean the circulated or published selling price of Sunkist for those products to any other purchaser who might be buying them to sell or resell to other retail buyers.

A. Sale to wholesalers and the like for retail consumption. [540]

Q. Now, the discounts I refer to in Exhibit 24, they are those we have previously discussed, is that correct? A. Yes. [541]

Q. And the reference to processing for Exchange Orange at cost refers to the amounts that were to be paid TreeSweet for processing the fruit made available to it under the price schedule for

(Testimony of James A. Finley.)

costs attached to the 1950 agreement, is that correct? A. That is correct.

Q. And were those increased in 1951, do you know?

A. The prices increased in 1951——

Q. The cost that TreeSweet was paying.

A. Over 1950?

Q. Yes. If you know. If you don't know, why——

A. In negotiating a contract we start with the previous contract, the previous year, and then starting at that point will take into consideration the increased cost of cans—they have gone up practically every year since '47—increased cost of labor, or increased cost of labels, or any increase in cost, that has been taken into consideration. So the 1951 contract allowance is probably a little higher, that is, their cost would be a little higher in '51 than it would be in '50, due to labor and can costs going up.

Q. Now, Mr. Finley, you have referred to the E. A. Silzle Corporation, I believe, during the course of your testimony. A. Yes, I have.

Q. They are, I believe, a processor of single-strength [542] Valencia orange juice.

A. Single-strength Valencia orange juice, and they processed some navel orange juice, grapefruit juice, a blend of orange and grapefruit, and they may have processed some lemons, I don't know.

Q. They sell their product, do they, in competition with single-strength Valencia juice that is proc-

(Testimony of James A. Finley.)

essed or was processed and sold by Sunkist in 1951, in interstate commerce?

A. Yes, it is sold in the same class of trade.

Q. Did Exchange Orange have any working arrangement, shall we call it, with Silzle in 1951 pursuant to which that company was furnished Valencia oranges by either Exchange or Sunkist for processing into single-strength Valencia juice?

A. Yes, we had arrangements with them about the same as with TreeSweet.

Q. Mr. Finley, did you have any discussion with anyone in Sunkist concerning the making of oranges, Valencia oranges, available to Silzle for processing into single-strength juice in 1951?

A. We had discussions for making oranges available to reputable single-strength canners in the year 1951. They left it up to me to go ahead and make those contracts.

Q. In other words, they were only to be made available to reputable canners, is that right?

A. That is the way I specified it in my recommendation [543] to the board.

Q. Reputable may mean a lot of things and different things to different people. Was it used in any particular manner when you just referred to reputable canners?

A. It was left to my discretion by the [544] board.

Q. And they gave you no yardstick or norm by which you would determine who or what canner was reputable? A. No, they didn't.

(Testimony of James A. Finley.)

Q. That was left up to your determination?

A. That was left up to me.

Q. Well, now, do you know whether any product Valencia oranges were sold to Silzle in 1951? Maybe that is an unfair question. I realize that is not in your department, but I thought you might know. If you don't know, just say so, Mr. Finley.

The Court: You are speaking of outright sales?

The Witness: Outright sales on a per ton basis, I did not know.

Q. (By Mr. Dixon): I am sorry. I didn't get your answer.

A. Per ton basis, I just don't remember.

Q. Did you have any discussion at any time with Mr. Kelly or anyone in his department concerning oranges that had been made available to TreeSweet in the early part of the processing season of 1951 which should be handled on any basis other than a direct payment for those oranges at the circulated Sunkist price list for Valencia product oranges?

A. Read the first part of that question over again, and I think you said TreeSweet.

Q. I eliminated TreeSweet. I am referring only to [545] Silzle in this question.

A. But if you read it, I think you said TreeSweet.

The Court: You said TreeSweet.

Mr. Dixon: Thank you, your Honor, for the correction. I meant Silzle.

Q. Do you now understand the question?

A. Yes, sir. The first I heard of it, of any

(Testimony of James A. Finley.)

oranges being made available to Silzle in the early part of 1951, early part of the Valencia season, was they wanted to know whether they could sell some juice to Silzle——

Q. They wanted to know what?

A. If they could sell some juice to Silzle.

Q. Who wanted to know whether they could sell some juice?

A. Well, Sam Kelly called me and said they had a few tons of fruit which they had sent to Silzle and wondered if they could sell it to them, and if 27 cents a gallon was a fair figure on the basis of the canned orange juice price which Case-Swayne was then selling for, as their supplies of fruit were coming from outside sources, and a price of 27 cents was proposed to Sam Kelly, I think by Silzle, and Kelly called me to see if that was a reasonable figure, because he did not know what 27 cents a gallon meant. He gave me what the price was that Case-Swayne was selling for, the canned goods, and by my own little formula, I figured out and said [546] it was probably worth about 27 cents, and there was a very few tons, as I remember it.

I heard Kelly yesterday, and I think he said it was 72 tons, and they wanted to meet the competition which was started by Case-Swayne, and the 27 cents a gallon.

Q. Who wanted to meet the competition?

A. Silzle had a pack, and they had to, or felt they had to meet the Case-Swayne competition, and

(Testimony of James A. Finley.)

Sam Kelly let them have 72 tons of fruit to meet that competition.

Q. You mean this price formula per gallon was what was figured out between you and Mr. Kelly, was it?

A. No. As I remember it, I think he worked it out more or less with Silzle in conversation with them, and the details, of course, I wouldn't know, and he called me just to confirm that price, to see whether it was a reasonable price, and I did a little figuring and said, well, yes, it was.

Q. I must confess, Mr. Finley, I haven't the slightest idea what this 27 cents per gallon figure is and what it means in connection with the selling price of a ton of Valencia oranges, which I believe several tons had been sold to Silzle which they had not apparently paid for. Is that correct?

A. Well, 72 tons wouldn't be over a day's operation for them, and how they got it and why they called me after they received it, I will never [547] know.

Q. How did you arrive at this figure of 27 cents a gallon? Can you tell the jury?

A. You can take 27 cents a gallon, add on or multiply that by your 4.3, which is the gallons per case, that gives you the juice cost per case, add on to that your manufacturing cost of around $1.35 or $1.40, whatever their cost would be, and then add onto that their brokerage, cash discount, label allowance, labels, or anything else they have, and you can come up with a price as to what you should sell

(Testimony of James A. Finley.)

for. Of course, you can start the other way around and start with the selling price and make those deductions come out with 27 cents, too. How he approached it, I don't know. [548]

Q. I would like to have you, if you can, Mr. Finley, transform—I don't care how you do it—that 27 cents a gallon figure into a selling price per ton, as compared to what Sunkist was then selling or making oranges available to independent processors for under their published price list.

A. Maybe I misunderstood your last question. You want it converted to price per ton.

There is roughly 100 gallons of juice per ton. 27 cents a gallon times 100 equals $27.00.

Q. In other words, whatever tonnage was involved in these transactions would run to about $27 a ton, is that correct?

A. Yes; 72 tons would run just about that figure.

Q. Mr. Finley, I will hand you Plaintiff's Exhibit 5, which is the Sunkist selling price of Valencia oranges for the processing season 1951. I will also hand you Plaintiff's Exhibit 7, which purports to be three delivery sheets showing the delivery of oranges by Sunkist to Silsle, under dates of June 12, 14, and 15, and which contain these gallonage figures that we have referred to before. I notice that the delivery sheet dated June 15 has the figure 123 solids. Is that the same solid as appears on Plaintiff's Exhibit 5 as selling for $41.15 a ton?

A. Yes, it is.

(Testimony of James A. Finley.)

Q. And the one dated 6/14/51 bearing the solid figure [549] 131. Will you tell the jury what a ton would sell for with those solids per ton?

A. According to the chart and Exhibit 5, 131 pounds of solids per ton would be $44.22.

Q. And referring to the one on June 12, '51, the solids purport to be 136 and 124; will you tell the jury what those were selling for per ton?

A. 136 pounds of solids per ton would be $46.13; and 124 pounds of solids per ton would be $41.53.

Q. And what was the price that we had figured out that was charged to Silzle under this juice arrangement? Or did we figure it out?

A. You told me it was 27 cents per gallon, or $27 per ton.

Q. Well, do you know of any reason, Mr. Finley, why Silzle was delivered the oranges referred to in that exhibit at a price of $27 a ton, when the same oranges were selling to any other idependent processor, or buyer of those oranges, at a price in excess of $40 a ton?

A. That was not in my department. He called me up for verification of the 27 cent figure, and as to what he had in the back of his mind I don't know.

Q. I take it your answer is that you don't know the reason for it? A. I don't know. [550]

Q. Did you inquire of Mr. Kelly as to his reason for making that change in the delivery sheet and price at which they were sold to Silzle?

A. As I remember it, we were starting negotia-

(Testimony of James A. Finley.)

tions with Silzle for a custom packing contract similar to the TreeSweet contract. and it was just during that period of time, and they wanted a few tons for a special order to meet Case-Swayne competition——

Q. Do you mean in single-strength juice?

A. In single-strength orange juice. And it amounted to so few tons, and it was in their records, I told them, I said, "Well, you go ahead and run them through your records, and in the custom packing contract I will run it through mine," which is the EOP contract.

It didn't amount to enough to throw it back and forth.

Q. But as far as Exchange Orange was concerned, your department had no contract or arrangement with Silzle at that time, did they?

A. No, we did not.

Q. So this arrangement, whatever it was, that existed at that time was one between Mr. Kelly and Silzle? A. Yes.

Q. Do you know whether oranges were thereafter made available to them at a price of $22.50 a ton?

A. Exchange Orange Products [551] Company——

Q. By Exchange Orange Products.

A. By Exchange Orange Products Company. I contacted Mrs. Silzle, who is the operating head of the Silzle Corporation, and asked her to come up and we would make a custom packing arrangement,

(Testimony of James A. Finley.)

selling her juice, and on the telephone I went over just the general terms to see if she was interested. I did not go over the detail, because she did not signify she wanted to do it. But she later signified she would be interested in it, and she wanted to go away, so I said, "Well, let's go ahead and we will send you 500 tons of fruit and you can go ahead, but we won't send you any more until we work out the details." And she saw me when she got back, and she got a few over the 500, because you can't guess at these truckloads of fruit that run 20 tons. They may ran 21, 22.

Q. I take it from your testimony that you contacted Mrs. Silzle at the E. A. Silzle Corporation for this arrangement?

A. As I remember it, I tried to contact her earlier, she was at—she was the operating head——

Q. What office does she have, if any, to your knowledge in this corporation?

A. Well——

Q. Is she the president of it?

A. From the start of it up to '50 I think she was president [552] of it. In '51 I am not so sure that they didn't change presidents, but as far as I was concerned she was the operating head of the Silzle Corporation.

Q. And you contacted her as you have indicated?

A. I tried to contact her. That summer she was, if I remember, down in the Imperial Valley quite a bit on her grapefruit grove, and whether I got

(Testimony of James A. Finley.)

ahold of her myself or told someone down at Silzle, her secretary or one of the fellows that I knew down there that I was trying to get her, I don't remember. But I finally reached her.

Q. In any event, you finally reached her?

A. Yes.

Q. Did you do this at Mr. Kelly's suggestion, to make these oranges available to Silzle?

A. No, because that was decided earlier in the spring, that we would make oranges available to the single-strength processors. [553]

Q. All on the same basis, I presume?

A. Yes. That is what we wanted to do, was treat them all on the same basis.

Q. In other words, you didn't want to discriminate between any of these independent processors, did you? A. No.

Q. In making the oranges available?

A. No.

Q. Now, you went ahead under this arrangement, then, without any written contract or understanding of any kind, and made over 500 more tons available to the Silzle Corporation, did you?

A. As far as Exchange Orange Products Company is concerned, we made the 500 tons available to her on a verbal contract.

Q. Was the price left open that Silzle was to pay for these 500 tons, or was it decided at the time or before you made the delivery of 527 tons?

A. I think the price was on a per case basis, we to take the oil and peel——

(Testimony of James A. Finley.)

Q. May I interrupt you, Mr. Finley?

A. Yes.

Q. I asked you whether you had agreed with Mrs. Silzle, or anyone at that corporation, with reference to the price at which you would make any of these 527 tons [554] available to them before you actually made them available to Silzle?

Do you understand my question?

A. I don't.

Q. All right.

The Court: Did Silzle know before they got the 527 tons what the price was going to be?

The Witness: They knew what the billing price would be at that time, would be on the basis of the price of canned juice, in our telephone conversation, when I talked to her.

Q. (By Mr. Dixon): Are you sure of that, Mr. Finley? A. At that time, yes.

Q. At what time are we talking about?

A. Well, we are talking about that 500 tons.

Q. Yes.

A. And before she received any of the 500 tons, I told her on what kind of terms we would make the canned juice available to her. She would custom pack and then buy back the canned juice. That was a verbal understanding which we had. I told her about the discount, and when she came back to town, she was going to or she might even come in from the——

Q. She wasn't very much interested in the deal, I take it, from your conversation, to start with?

(Testimony of James A. Finley.)

A. I didn't know it at the time, but that year she was [555] sort of dropping out of the business and turning the business over to somebody else, which I did not know until later in the season, but up to that time she was very, very active.

* * *

Q. (By Mr. Dixon): Was the E. A. Silzle Corporation to pay either Sunkist or Exchange Orange for any of the oranges that Exchange Orange or Sunkist delivered to it in 1951 under any arrangement except the—I mean were they to be paid for on a cash basis per ton?

A. The 500 tons was to be paid for at the time that we made the price on a per case basis, but the net result of the transaction, it was so confused because of other circumstances, that it was easier to convert it back to a per ton basis and wipe out the transaction, so we put that in the contract, because the contract was not written until after that period of time, and we had a chance to sit down [556] and go over details of their particular operation. No two plants operate the same and I had made some wrong assumptions on the way they operated.

Q. The arrangement that you ultimately reduced to writing was not signed until September 10, 1951, was it, Mr. Finley? A. That's right.

Q. You operated under this oral confused arrangement that you mentioned, whereby you continued to supply Silzle with oranges during that period?

(Testimony of James A. Finley.)

A. It was on the first 500 tons, and then that was straightened out, and then we started in on a definite basis, but the contract was not signed until September 10th.

Q. In other words, if I understand your testimony correctly, up until September 10, 1951, Exchange Orange or Sunkist made Valencia oranges available to Silzle for processing into single-strength juice under an arrangement not reduced to writing?

A. It was reduced to writing, but not signed.

Q. You mean it laid around on somebody's desk a long time before it was signed after it was reduced to writing?

A. No. The agreement as to price, and so forth, can be written very easily, and then as you write it up to a formal contract, you put in some extra words and protective clauses, and it was not signed until September 10, but it [557] was a verbal contract during that period of time.

Q. But during this period of time Sunkist continued to make oranges available to Silzle under this oral arrangement?

A. Exchange Orange Products Company made them available.

Q. Now, I will show you Plaintiff's Exhibit 6 and ask you to refer to the delivery sheets contained therein, commencing June 27, 1951, and ending August 4, 1951, and ask you to explain, if you can, how the price per ton or rate per ton figure computed on

(Testimony of James A. Finley.)

that is taken out in pencil in each one of the invoices or delivery sheets up to that date.

A. I am looking to see whose form this is. This is the first time I have ever seen it.

Q. Were you here yesterday? A. Yes.

Q. When Mr. Kelly was testifying?

A. Yes.

Q. Mr. Kelly didn't seem to know much about this form either. Is this the first time you have ever seen this form?

A. Yes. Here it is. CDP—that stands for Citrus Distributing Plant—form No. M-9. The Citrus Distributing Plant is in Los Angeles. That is Sunkist.

Q. Maybe the jury doesn't understand, and I may be a little uncertain about what Citrus Distributing Plant is. Is that one office of Sunkist or—— [558]

A. That is a department of Sunkist.

Q. Just a minute. Is that an office of Sunkist that handles the product oranges that are sold to processors?

A. Yes. It handles the product oranges sold to processors. Over and above what is sold to processors is turned over to Exchange Orange Products. Sam Kelly is the manager of CDP.

Q. Would you say from examining that exhibit that Sunkist or this department, whatever you call it, turned over all those oranges referred to in those delivery sheets to Silzle on the date specified? Is that a fair assumption? A. I would assume that.

Q. But you don't know who changed or took

(Testimony of James A. Finley.)

off the price per ton figure on each one of those invoices? A. No.

Q. Did you give instructions to anyone to do so?

A. I told Kelly to send for the account of EOP 500 tons to Silzles.

Q. At what price or under what arrangement? Just to deliver them?

A. For the account of Exchange Orange Products Company.

Q. But at what price, if any, were they to be delivered to Silzle?

A. There would be no necessity of naming a price, because they are under the control of Exchange Orange Products [559] Company.

Q. You mean these oranges, then, were under your control even though they were distributed or made available by this distributing office of Sunkist?

A. No. I think I—well, let me ask a question. Is this the 527 tons we are talking about?

Q. I don't know. I am just asking you for information.

A. If you total them up, it would be a clue. I told Sam Kelly around the June 27th figure to make 500 tons available to Silzle for the account of Exchange Orange Products Company. From looking at this, I can see where the accounting department and all, they ran it through as a normal operation, and then sometime during that period of time somebody, maybe Sam waited a week before he told

(Testimony of James A. Finley.)

A. Yes, it is.

Q. And is it sold in competition with the product of Exchange Orange?

A. The Mission Dry Corporation in making their 65 Brix concentrate, they further process that into a beverage base before shipment under their label. The Exchange Orange Products Company sells through the Sunkist Growers a 65 [584] Brix concentrate to go to bottler supply houses, who do the same thing that Mission will do from that stage on.

Q. Was the fruit which was delivered to Mission Dry under this contract paid for by Mission Dry at the time it was delivered, Mr. Finley?

A. Mission Dry bought the concentrate. The concentrate——

The Court: Just a minute. Let's answer the question, then give your explanation.

Read the question, Mr. Reporter.

(Question read by the reporter.)

The Witness: It was not.

The Court: Now you may explain it.

The Witness: The concentrate went into the Lawrence Bonded Warehouse, and then it was paid for at the time it was taken out.

Q. (By Mr. Dixon): In other words, if I understand your answer correctly, the oranges were delivered to Mission Dry under this contract, but were paid for as oranges only when the product taken or processed therefrom was sold by Mission

(Testimony of James A. Finley.)

Dry or taken out of the Lawrance warehouse; is that correct? A. Yes.

Q. And can you state to the jury how long under this contract might elapse—how long a period of time might elapse from the delivery of the oranges to Mission Dry before they were taken out of the Lawrence warehouse and paid for [585] in the manner that you have indicated?

A. The Valencia oranges delivered from June to November, that was taken out before March 31st of the following year.

Q. How was the cost of the fruit that was delivered to Mission Dry under this contract determined, Mr. Finley?

A. We had a record of their yields, that is, gallons per ton recovery, and took the going price of the fruit at the time which they operated, and by division set a value on the juice portion of the concentrate.

Q. I am not sure that I understand just how that works. Can you explain that to the jury? Let's assume, for example, that you have a ton of oranges of 120 pound soluble content, which under you 1951 price list would be selling for $40 per ton; would that be the price that Mission Dry would pay for a ton of oranges when they took the concentrate out of the warehouse?

A. Take the $40 a ton, divide—that product runs roughly 15 gallons to the ton——

The Court: 15 gallons of concentrate?

(Testimony of James A. Finley.)

Q. When did you make such an inspection, approximately?

A. The early part of June. I went down originally to look over their peel situation, because we were going to have them run on peel for orange peel first, and I was down there at that time.

Q. Was that the time at which you discussed with someone at Silzle the making of an arrangement to make oranges available to them during the processing season?

A. No, I don't think so. [589]

Q. There was no discussion at that time?

A. No. It was a peel arrangement.

Q. Were you investigating the plant just for the purpose of looking over their facilities for handling peel?

A. In going through it, I looked over other things, kept my eyes open.

Q. Who was accompanying you on that inspection tour, if you recall, for Silzle?

A. I don't recall.

Q. Was it Mrs. Silzle?

A. I just don't remember who it was.

Q. From the point of availability of product fruit, Mr. Finely, would you say that '51 was comparable to '49, that is the year 1951 comparable to the year 1949?

A. I think there would be more fruit in '51 than '49 generally.

Q. I take it neither Exchange Orange nor Sunkist has any financial interest in Silzle?

(Testimony of James A. Finley.)

A. It does not.

Q. Did you ever get a credit report in 1951 from Dun & Bradstreet concerning the financial condition of Silzle?

A. No. Exchange Orange Products did not, I know.

Q. Did you ask them for a financial statement before you made any arrangement with them in 1951? [590] A. No, we did not.

Q. Now, you stated you made an inspection of the Silzle plant in June of 1951. Was that the only inspection you made?

A. I think it was about the only one I made that year.

Q. By the way, Silzle, I believe, in case you haven't mentioned it, produced single strength orange juice.

A. Single strength orange juice, single strength grapefruit juice, and single strength blend.

Q. And all of those products are the kind that Exchange Orange also makes and sells in interstate commerce? A. They are.

Q. Through Sunkist? A. Yes.

Q. And they are in competition with the products of Sunkist, are they not?

A. They are. [591]

Q. Now, getting back to this inspection tour, did you notice when you made this survey whether Silzle had any canning line for the 12-ounce size of single strength juice?

A. No, I didn't notice.

(Testimony of James A. Finley.)

them, and they went back and corrected it to my original statement.

Q. But if you or someone from Exchange Orange had not advised the distributing department or Sunkist about that oral arrangement with Silzle, the oranges that were delivered under those delivery sheets to Silzle would have been delivered at the price specified in the tonnage place, would they not?

A. Without checking the figures, I assume they are correct.

Q. I don't know who put the figures there, but I assume they are correct. That would have been the price [560] Silzle would have paid, would they not, for those oranges delivered to them under that arrangement?

A. If they hadn't made arrangements with the EOP company in the meantime. [561]

* * *

Mr. Dixon: Plaintiff's Exhibit 25 offered in evidence.

Mr. Hurd: I believe I have a continuing objection that applies to this, for the record.

The Court: Just a minute.

Your objection is overruled, on the views I have heretofore stated.

I assume that you are going to show performance extending into '52?

Mr. Dixon: Yes, your Honor.

The Court: Which would make it admissible on another ground.

(Testimony of James A. Finley.)

So without discussing it, you know my views.

Mr. Hurd: Yes, your Honor. I am just doing it for the record.

The Court: Exhibit 25 received in [562] evidence.

* * *

The Court: The record will show the jury absent.

As to Exhibit 25, this objection that you make is not based upon lack of foundation, but entirely on the question of the statute of limitations?

Mr. Hurd: That is correct.

The Court: All right. That is so we understand each other.

To enlarge upon what I had to say, it has an amendment to it dated into February of '52, which would of course be within the statute of limitations if we considered it as starting with the filing of the amended complaint.

In addition, counsel has indicated that he is going to show performance of it in '52.

However, I am of the view that it is admissible under the original complaint, in the sense that the amended complaint dates back to the filing of the original complaint.

So we understand each other, do we?

Mr. Hurd: Yes, I understood. I didn't mean to be reopening the matter. I was just making my objection for the record to be consistent on it. [564]

* * *

(Testimony of James A. Finley.)

Mr. Dixon: The plaintiff offers in evidence Exhibit 17-A, which I inadvertently omitted last week, the same being entitled——

The Court: No objection?

Mr. Williams: I assume that is being offered as background only, not as the basis for any cause of action, like the other contracts?

The Court: Not as the basis of some specific act or damage.

Mr. Williams: On the same basis as the other Mission [580] contracts?

The Court: That's right.

Mr. Williams: We have no objection.

The Court: Exhibit 17-A received in evidence.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 17-A.)

The Court: 17 was the Mission Dry contract, as I recall. I take it this is connected with Mission Dry?

Mr. Dixon: That's right, your Honor. [581]

* * *

Q. Now, Mr. Finley, this contract, I believe, is dated June 1, 1949. A. Yes, it is. [582]

Q. Are you familiar with the provisions of this contract? A. Yes, I am.

Q. Was it in full force and effect in 1951?

A. Yes, it was.

Q. Were oranges, Valencia oranges, delivered to Mission Dry by Exchange Orange during that year under this contract? A. Yes, they were.

(Testimony of James A. Finley.)

Q. Is the contract still in effect?

A. Yes, it was, in 1955.

* * *

Q. (By Mr. Dixon): Mr. Finley, directing your attention to Article 3 which I just read, will you state to the jury what the purpose of this provision is with reference, particularly, to permitting Mission Dry to convert the oranges supplied thereunder into 65 degree Brix orange concentrate?

A. The purpose of that article? Making beverage bases, [583] you start in basically with a 65 Brix concentrate, but in certain blends you may use what we call a pulpy type Juice or a juice made by some other method, so it takes so many gallons of 65 Brix and then so many gallons of a pulpy type juice. So that paragraph was put in there to permit them to make their finished product.

Q. Was there any limitation intended on the products which Mission Dry might make from the oranges purchased from Exchange Orange under this contract?

A. Knowing the type of equipment that they had, why, it was limited as to what products they could make.

Q. Now, this company, as I understand it, does not make single-strength Valencia orange juice?

A. It does not make single-strength. It does not have the equipment to do it.

Q. The orange Brix concentrate which they manufacture or process, is that the same kind of product that Exchange Orange also makes?

(Testimony of James A. Finley.)

The Witness: Of concentrate per ton. You take the $40, divide it by 15, and that would give the cost of the juice portion. If for any reason the fruit was a different grade and you just got 14, you take the $40 and divide it by 14. [586]

Q. How did this formula work out? Did it work out so that Mission Dry would only pay, say, $38 for a ton of $40 fruit, or would they pay $42 for a $40 ton of fruit?

A. They would pay the $40, the going price.

Q. You mean that regardless of this formula, then, they would pay the $40 per ton specified in the price list of Sunkist for those oranges?

A. Yes.

Q. Well, then, if they would pay the price of $40 per ton in any event, what was the purpose of this formula that you have just mentioned as the means of determining the price to be paid would be $40 a ton?

A. The purpose, Mission wanted a dependable source of supply of fruit, and this is a deferred payment plan of paying for their requirements. To do it, we put the concentrate in Lawrence Warehouse and set up the value on the juice portion of the concentrate, they furnishing the cost of manufacture. That gave us our security.

Q. Well, I take it from your answer that they still paid $40 per ton regardless of this arrangement, is that correct?

A. $40 on the basis of 120 pounds of solids.

The Court: Well, I don't know whether it is

(Testimony of James A. Finley.)

clear to the jury. Let's see if I can state it. Since this material was coming out of the warehouse from time to time you had to know [587] how much to allocate to the particular concentrate coming out of the warehouse.

The Witness: Yes.

The Court: By using the formula you could reduce the oranges from $40 a ton to so much per gallon of concentrate. Therefore, when 100 gallons of concentrate came out, you knew how much money Mission Dry had to pay you?

The Witness: Yes.

The Court: Otherwise, if you just used $40 a ton for oranges, without the formula, you wouldn't know how much to collect off Mission Dry when they took out 100 gallons of concentrate.

The Witness: That's right. [588]

* * *

Q. So that Exhibit 17 and Exhibit 17-A are tied in together, are they, Mr. Finley?

A. Yes, they are. They go along together.

Q. Now, coming back, Mr. Finley, to the Silzle Company, the Silzle plant at Anaheim was located right next to the plant of Winckler & Smith in 1951, was it not?

A. Yes, in the same neighborhood.

Q. Before Plaintiff's Exhibit 25 was entered into, Mr. Finley, did you inspect the Silzle plant?

A. Yes, I was down there.

(Testimony of James A. Finley.)

Q. Do you know as a fact whether they did have a 12-ounce canning line size?

A. Those machines, many of them, they will be converted. So if I saw it for a No. 2 can I wouldn't know whether they could convert it over to a 12-ounce by a simple adjustment. I didn't notice what size they had their machines set for at that time.

Q. Then I take it, you don't know, and didn't know in 1951, whether they had such a canning line, or not, insofar as the Silzle facilities for canning were concerned?

A. I did not know they had a 12-ounce line.

Q. That size is processed, isn't it?

A. To a minor degree.

Q. I direct your attention, Mr. Finley, to paragraph 5 of Plaintiff's Exhibit 25, which for the jury—— [592]

* * *

Q. (By Mr. Dixon): Mr. Finley, can you tell the jury who this Hart's Fruit Products Company is that is referred to?

A. The Hart's Fruit Products Company is a concern located in Brea that were equipped to make frozen concentrate, but were not equipped to make oil. As we furnished the fruit and we took the oil and peel, we made arrangements in that area to take the oil out of the peel before it went to the driers.

Q. You did have an arrangement with Hart's, I believe, in Plaintiff's Exhibit 19, I believe it was, whereby that [593] company, as you may have suggested, processed oranges for the account of Ex-

(Testimony of James A. Finley.)

change Orange into frozen orange concentrate in 51; is that correct? A. That is correct.

Q. Before you made Plaintiff's Exhibit 19, Mr. Finley, that contract, with Hart's Fruit Products Company that I just referred to, and which is referred to in paragraph 5, did you get any financial statement from that company?

A. No, because we didn't need one, because we would be owing them money instead of them owing us money.

Q. You mean under the processing arrangement?

A. Yes, under the processing contract they were doing it for us.

Q. Which was carried out under Plaintiff's Exhibit 19?

A. Yes, if Exhibit 19 is the Hart contract.

Mr. Dixon: I just want to be sure that it is.

The Court: All right.

Q. (By Mr. Dixon): I take it, therefore, that you didn't get any Dun & Bradstreet report on Hart's before you made that contract with them?

A. No, I did not.

Q. Well, it is a fact, is it not, Mr. Finley, that Hart's shortly after the contract was entered into, and during the year 1951, entered into an assignment for the benefit of creditors? [594]

A. Well, as to just exactly when, from the legal standpoint, they went into assignment, the Hart Company was in difficulty even in the winter of 1950 and another concern was taking them over.

(Testimony of James A. Finley.)

They were going to do business under the name of Hart's, but I made all my contacts with this other concern that were taking them over. And the fellow didn't think it was still a good deal, so he dropped out of it, and then I think it went into some kind of an assignment basis, but we were out of it by that time.

Q. Well, in other words, you were aware of the fact that Hart's were allegedly in financial difficulties even in the latter part of 1950?

A. Yes.

Q. And the contract, Plaintiff's Exhibit 19, was entered into between Exchange Orange and Hart's before there was any assignment for creditors by that company; that is so, is it not, Mr. Finley?

A. That's right. [595]

* * *

Q. (By Mr. Dixon): Now, Mr. Finley, directing your attention to that paragraph, it is a fact, is it not, that any orange juice that was processed by Silzle under Plaintiff's Exhibit 25 into single strength Valencia orange juice was sold solely under Silzle's label or someone who purchased that product from Silzle and wanted their particular label placed thereon? A. That is correct.

Q. In other words, none of the single strength Valencia orange juice processed by Silzle under this agreement was [596] ever sold under the Sunkist label? A. It was not.

Q. Or under the Exchange label?

(Testimony of James A. Finley.)

A. That is correct.

* * *

Q. (By Mr. Dixon): Now, directing your attention to that provision in this contract, Mr. Finley, are those 527.95 tons referred to therein any part of the tonnage that we have heretofore talked about and which were indicated as having been delivered to Silzle under Plaintiff's Exhibits 6 and 7?

A. Exhibits 6 and 7 are reports from the citrus distributing plant and the Exchange Orange Products Company has nothing to do with them. I don't know.

Q. I take it your answer is then you can't answer the question? A. No.

Q. Can you state to the jury, then, of your own knowledge when these 527.95 tons were delivered to Silzle at $22.50 a ton?

A. The latter part of June and July. [597]

Q. Do you have any records in your office or company that would indicate when those tons were in fact delivered to Silzle?

A. I imagine so, although I couldn't swear to it, because I don't do that type of work.

Q. Handing you Plaintiff's Exhibit 11 and directing your attention to the last sheet contained in that exhibit, it specifies in detail the time or, rather, just the delivery numbers, apparently, and the weights of the 527.95 tons of oranges. Will you refer to that, Mr. Finley, and state whether you

(Testimony of James A. Finley.)

now have your memory refreshed as to whether Exchange Orange made those deliveries?

A. These deliveries were made to Silzle for the account of the Exchange Orange Products Company. CDP actually arranged the delivery of this fruit.

The Court: CDP is the——

The Witness: Is the sales organization, and they have salesmen out in the country who know where the fruit is and they are the ones that call us and tell us where the fruit is available. [598]

The Court: What does CDP mean?

The Witness: Citrus Distributing Plant.

The Court: Department of Sunkist?

The Witness: That is a department of Sunkist under Sam Kelly.

Q. (By Mr. Dixon): I am not sure whether I asked you this question before, Mr. Finley, but did you have any discussion with Mr. Kelly or anyone in Exchange Orange at any time about the price of $22.50 per ton to be paid for 527.95 tons of oranges delivered to Silzle?

A. I had no discussion with anyone at CDP, or anyone in the organization, on the $22.50 a ton.

Q Well, was this contract prepared by you and under your supervision as the manager of Exchange Orange?

A. It was prepared under my supervision.

Q. When was it prepared? A. It was——

Q. Approximately.

(Testimony of James A. Finley.)

A. Started preparations on it the latter part of June before this 527 tons was delivered to them.

Q. What do you mean you started preparations?

A. Started verbally to go ahead and make a contract.

Q. I see I have not made my question clear, Mr. Finley. Did you dictate this contract or have it reduced to writing? [599] A. No, I did not.

Q. To your knowledge who did, if you know?

A. Arville Smith.

Q. Did you discuss it with Mr. Smith before he had it done? A. Yes.

Q. When did that discussion take place? I am referring now to the time immediately preceding the reduction of this contract to writing, Plaintiff's Exhibit 25.

A. Immediately preceding the September 10th date?

Q. Yes.

A. Mr. Smith came to me and said that the Silzle contract, which was verbal, was just an impossible thing to work out, unless they went down there and went through all their records, because they had mixed their peel in with other purchase peel, their oil was mixed, and it was going to be an impossible task, practically. And I told him, well, let's go ahead and figure up what the thing figures out and block it in there and put it in in one paragraph and save all that trouble.

Q. This discussion that you had with Mr. Smith occurred September——

(Testimony of James A. Finley.)

A. Previous to September 10th.

Q. Of 1951? A. Yes, 1951. [600]

Q. And prior to that time you had been working under this oral arrangement, whatever it was, is that correct? A. That is correct.

Q. Well, now, did you tell Mr. Smith to cover these 527.95 tons at $22.50 a ton when he wrote up the contract?

A. No. We took the price of juice that we sold to them, what the price of that juice was, and then by the formula converted it back to see what it would come out, and it came out roughly $22.50 a ton.

Q. And those were the oranges which had theretofore been billed at the prices set forth in the exhibits, is that correct, Plaintiff's Exhibits 6 and 7, I believe it is?

A. By having some of these Silzles' in Exhibits 6 and 7 wiped out during that period of time, I assume that Sam Kelly did not pass the information on to the clerical department of CDP, and at the end of the month as some time probably told them to correct their records.

Q. But you were the one, were you, Mr. Finley, who determined this $22.50 per ton price to Silzle?

A. That was done, I think, jointly with——

Q. Would you please answer that directly, Mr. Finley? Do you understand the question?

A. I approved that price, yes.

Q. Well, did you establish the price at $22.50 a ton, or did somebody else establish it? [601]

(Testimony of James A. Finley.)

A. Mr. Smith calculated it for me and I okayed it.

Q. So this $22.50 price was one that was worked out by you and Mr. Smith, is that correct?

A. That is correct.

Q. And who was Mr. Smith?

A. He is our comptroller in charge of accounting.

Q. Of Exchange Orange?

A. Of Exchange Orange Products.

Q. This price, then, of $22.50 was computed at the time the contract was reduced to written form on September 10, 1951; is that correct?

A. Previously to September 10th.

Mr. Dixon: Now, ladies and gentlemen, I am now going to read to you sub-paragraph (B) under the heading of "Price."

* * *

Q. (By Mr. Dixon): I believe, Mr. Finley, that the figures 24 mean two dozen, do they not?

A. 24 is two dozen. [602]

Q. (By Mr. Dixon): So that the actual price per case would be twice the 1.98, would it not, or is that the price per case?

A. That is the price per case.

The Court: A case of those sizes consists of 24 cans?

The Witness: Yes.

The Court: And a case of the big ones consists of 12 cans?

(Testimony of James A. Finley.)

The Witness: Yes.

The Court: All right.

Q. (By Mr. Dixon): Is this price, Mr. Finley, a price per dozen?

A. No. It is a sales price per case.

Q. All right. I just wanted to be sure that was correct. A. Yes. [603]

* * *

Q. (By Mr. Dixon): Now, directing your attention to this contract, Mr. Finley, do you find any provision in there dealing with the inspection of this product, the single strength orange juice processed by Silzle under this contract?

A. We have the right to. [608]

Q. What provision is that?

A. I would put it under the other conditions. "It is agreed that seller may examine and audit purchaser's records at any time * * *."

Q. That deals only with the records, does it not?

A. Laboratory records or any records.

Q. Well, did you ever resort to that provision, Mr. Finley? A. No, we didn't.

Q. With reference to examining the product processed by Silzle under this agreement?

A. No, we never did.

Q. Did you have any inspectors from Exchange Orange in the plant of Silzle while Silzle was processing oranges delivered to it under this contract into single strength Valencia juice?

A. Not to my knowledge.

Q. If there were, would you have known about it?

(Testimony of James A. Finley.)

A. I would have known about it. I don't think we did.

Q. I direct your attention to supplement No. 1 attached to Plaintiff's Exhibit 25, which bears the same date, namely September 10, 1951. [609]

* * *

Q. By Mr. Dixon): Now, Mr. Finley, all of the oranges delivered by either Sunkist or Exchange Orange to Silzle Corporation, or Silzle, under this oral and subsequently written agreement, Plaintiff's Exhibit 25, were processed by Silzle, were they not, into single strength Valencia orange juice?

A. Yes, they were.

Q. And Silzle paid for the oranges that were thus processed—strike that.

The only payment made by Silzle to Exchange Orange for any oranges that were delivered to it under this contract were the amounts paid by Silzle to Exchange Orange for the juices as they were sold under this contract, is that correct?

A. Except for that "A" which is referring to 527 tons, that was sold—because of the mixture of the oil and peel that was sold with the fruit, because it could not be divided.

The balance, the juice was sold to Silzle and then we kept the oil and peel. [613]

Q. Mr. Finley, you are thoroughly familiar with the processing costs and arrangements whereby oranges are processed by your company into single-strength Valencia juice, are you not?

(Testimony of James A. Finley.)

A. Yes, I am.

Q. Rather elaborate records are maintained by Exchange Orange in connection with all of these various phases and segments of the citrus juice processing business of Exchange Orange?

A. Yes, sir, there are lots of records kept.

* * *

Mr. Dixon: Plaintiff's Exhibit 26 offered in evidence.

The Court: Exhibit 26 received.

* * *

Q. (By Mr. Dixon): Mr. Finley, I hand you Plaintiff's Exhibit 26 and ask you if you will state to the jury, if you [614] can, what that is?

A. This page 6 of Exhibit 26 has to do with the fruit tonnage data as received by the Exchange Orange Products Company, and the distribution of that fruit.

Q. For what year?

A. For the month October, 1951.

Q. Is this only the monthly report, or is this the season report?

A. The report is for the month of October, 1951. and the 1950-51 season.

Q. Your 1950-51 season ends October 31, 1951. does it not, Mr. Finley? A. Yes, it does.

Q. So that these figures, whatever they are, on Plaintiff's Exhibit 26, cover the season?

A. It covers the month and season to date. I see it.

(Testimony of James A. Finley.)

Q. I notice at the bottom of Plaintiff's Exhibit 26 an item Fruit tonnage to outside processors, then follow the names of certain companies; will you state who those companies are?

A. Bireley's for EOP——

Q. Just a moment. And the tonnage. Is there a tonnage figure?

A. For the season, season tonnage is 20,643.94.

Q. Does that represent the tonnage that was delivered [615] to Bireley's under Plaintiff's Exhibit 18?

Shall we explain to the jury, or will you explain to the jury, Mr. Finley, whether Bireley's referred to there is the same company or division of the General Foods Corporation referred to in Plaintiff's Exhibit 18?

A. Bireley's is a division of General Foods.

Q. So that the Bireley's that you just referred to is General Foods that is referred to in Plaintiff's Exhibit 18? A. That is correct.

Q. And next what name or company is referred to or found on this exhibit, Plaintiff's Exhibit 26?

A. The next item is Hyland-Stanford for EOP. Season 14,855.89 tons.

Q. And the Hyland-Stanford referred to, is that the Hyland-Stanford with whom Exchange Orange had the contracts, Plaintiff's Exhibits 15 and 16?

A. Yes, it is.

Q. What is the next company that you find there? A. Mission Dry for EOP.

Q. And is the Mission Dry referred to therein

(Testimony of James A. Finley.)

the same Mission Dry that is referred to and is part of Plaintiff's Exhibit 17?

A. That is correct.

The Clerk: There is 17-A, also, counsel. I don't know whether you want that one. [616]

Q. (By Mr. Dixon): And 17-A?

A. That is correct.

Q. The next one is Damerel-Allison for EOP. Will you tell the jury who Damerel-Allison is or what it is?

A. Damerel-Allison is a company in Covina, California, for the production of citrus products, and that company was bought by the Exchange Lemon Products Company——

Q. When?

A. In 1950, I think it was. [617]

Q. What is the business of Damerel-Allison?

A. Damerel-Allison made frozen concentrate and a fresh juice put up in quart paper containers.

Q. Did it make any single strength juice, to your knowledge?

A. No, except that which went in a paper container.

Q. The next one is "Corona for EOP." Does that refer to the Corona plant of ELP?

A. Yes, it does.

Q. The next item is "Hart's for EOP." Is that Hart's referred to in Plaintiff's Exhibit 19?

A. Yes, it is.

Q. All of those companies that we have mentioned, under them the words "for EOP" appear, is that correct? A. Yes.

(Testimony of James A. Finley.)

Q. Now, will you tell the jury what the next company referred to is? A. TreeSweet.

Q. Do you find or is there contained on said exhibits any words "for EOP" following the name TreeSweet? A. No, there is not.

Q. I also notice the words Cold Gold. Do you find anything there? A. No, I don't.

Q. "For EOP"? [618] A. No.

Q. Does the name E. A. Silzle Corporation or Silzle appear anywhere on this Plaintiff's Exhibit 26? A. It does not.

* * *

Q. (By Mr. Dixon): Now, that Plaintiff's Exhibit 26, Mr. Finley, purports to represent the tonnage delivered to processors who are actually in fact processing the tonnage referred to therein for the account of Exchange Orange, does it not, where the symbols "for EOP" are placed after the name of such company? A. Yes, it does.

Q. Do you have any explanation or can you tell the jury whether TreeSweet and any oranges that were delivered to it under Plaintiff's Exhibit 25 was omitted from any computation or reference in that exhibit? A. What is the question again?

Q. I will withdraw it. It may not have been quite clear.

The tonnage referred to under TreeSweet is the tonnage, [619] is it not, that was delivered to TreeSweet by Exchange Orange or Sunkist pursuant to the provisions of Plaintiff's Exhibit 20, Mr. Finley,

(Testimony of James A. Finley.)

that is the contract between TreeSweet and Exchange Orange for the year 1951?

A. Yes, it is.

The Court: Well, I don't understand. Let me ask a question.

Mr. Dixon: Yes, your Honor.

The Court: Is the 22,000 tons that is shown—I think it is 22,000 and some odd tons—shown after TreeSweet, is that fruit that was processed by TreeSweet for EOP's account?

The Witness: Yes, it was.

The Court: That does not include the fruit which was processed by TreeSweet which went into canned juice, which cans TreeSweet bought for its own account?

The Witness: That was the fruit which EOP delivered to TreeSweet for them to can under the contract, and then TreeSweet bought the canned juice from us. That is the figure.

The Court: I don't recall. Was there any fruit processed by TreeSweet for Exchange Orange and then the cans turned over to Orange that year?

The Witness: I don't think so. If it was, it wouldn't be over——

The Court: Then this is the total figure?

The Witness: This is the total figure. [620]

The Court: All right.

Q. (By Mr. Dixon): Will you state to the jury, Mr. Finley, why the words "for EOP" are not contained on the exhibit you are referring to?

A. I don't know of any particular reason. I no-

(Testimony of James A. Finley.)

tice that Hart's is "for EOP." Cold Gold was exactly the same type of organization, that is, they made frozen concentrate, and it has not got "for EOP." The "for EOP" started by a report which CDP turns out on their distribution of fruit, that when they would send Mission fruit it would be on there, "for Mission," or just left blank, so if there was any chance of it being for EOP, it was put on there afterwards as in the case here, "for EOP." In the case of TreeSweet and Cold Gold, I take it that there was no—well, nothing came up to put that on there. There is no purpose of it.

Q. In other words, General Foods, Hyland-Stanford, Mission, and those other contracts where that appears, "for EOP," in those cases it is a fact, is it not, Mr. Finley, that all of the juice or concentrate that was processed under those arrangements was actually processed for the account of Exchange Orange, is that not so?

A. All the concentrate produced by them from EOP fruit. They could have purchased some other fruit which we know nothing about.

Q. Any of the concentrate or products so processed [621] under those contracts if sold by Sunkist would be sold under the Sunkist label or private label brand, would it not?

A. Yes, it could be.

Q. Well, do you know whether any of the juice that was processed, pasteurized orange juice, under those contracts where the words "for EOP" appear

(Testimony of James A. Finley.)

was sold by any of the companies for the account of those companies and as their product?

A. No. They did not sell that. They made their own requirements under the other contracts.

Q. Well, they may have processed some for their own account, but the citrus juice products processed that are referred to in that exhibit here, as it indicates, were processed for the account of EOP in its entirety, were they not, Mr. Finley?

A. That is correct. [622]

* * *

Q. May it please the Court, and ladies and gentlemen of the jury. I believe when we adjourned we were discussing Exhibit 26, Mr. Finley. Will you state again to the jury what that exhibit is contained in or taken from?

A. The book is our cost department records of the different costs in the different departments and operations throughout the plant. This one particular page, which has been put in evidence, is the fruit tonnage that was processed at the EOP plant, and the distribution of that fruit going to the different departments, just for our cost department records only, and not for keeping track right to the ton of fruit.

Q. But all of the companies that were mentioned in that exhibit or that are mentioned in that exhibit, with the exception of TreeSweet, and I believe one other, had the [623] language, "for the account of EOP," after them, did they not, Mr. Finley?

(Testimony of James A. Finley.)

A. They all have, except TreeSweet and Cold Gold.

Q. And those two companies have nothing after them, such as, "for the account of EOP," or any other description? A. That is correct.

Q. State, if you will, whether you find the name Silzle on that exhibit?

A. Silzle is not on this exhibit.

Q. That does include the entire processing or production records, does it, of Exchange Orange, during the period represented?

A. No, Silzle is not on it, Hyland-Stanford for Hyland-Stanford is not on it; Mission Dry for Mission is not on it; ELP is on it.

Q. Just what is that record supposed to represent, then, Mr. Finley? Anything in particular?

A. No, I can't see why that record is in there, because this is a cost department record of what is going through our plant. It is just a memo record of some kind that is put in there, because the tonnage figures are not in the tonnage figures up above, so it is a memo record, and I don't know why it is there. [624]

Q. (By Mr. Dixon): Now, Mr. Finley, who determines the selling price for Sunkist for, shall we say, single strength Valencia orange juice and other citrus juice products?

A. The canned juices?

Q. Yes. A. Or citrus product?

Q. Yes. A. I do.

Q. You do? A. Yes.

(Testimony of James A. Finley.)

Q. You determine that price in consultation with anyone else, or do you determine it on your own account?

A. Well, I run my little own survey, you might say, just what I can hear, and then the sales department, who has charge of the sales, they will come down and tell me what they hear, because they are the ones who talk to brokers and the trade. I am the one that talks more to the producers to know how much will be packed in Florida and California each year. So we get together, and after that consultation, I will go ahead and set a price.

Q. But you are the one, are you, who has the final determination concerning the prices at which the product processed by Exchange Orange are made available to the trade by Sunkist?

A. That is correct. [625]

Q. Do you determine those prices in consultation in any way with Mr. Kelly?

A. Not on the canned juices, no.

Q. Or with anyone else in Sunkist?

A. No.

Q. Mr. Wilcox, for example?

A. No, not with Mr. Wilcox.

Q. Mr. Armstrong? A. No.

* * *

Mr. Dixon: Plaintiff's Exhibits 27 and 28 offered in evidence.

The Court: 27 and 28 received in evidence.

* * *

(Testimony of James A. Finley.)

Q. (By Mr. Dixon): Directing your attention to Plaintiff's Exhibit 27, will you state to the jury what that is, [626] Mr. Finley?

A. These are the price lists sent out to the brokers and trade by the Sunkist Growers.

The Court: For what year?

The Witness: For the year——

Q. (By Mr. Dixon): Well, it does contain, does it not, the price lists circulated to prospective buyers of Sunkist citrus juice products for the years 1951 and through the 1952 processing or sales season for those products?

A. Let's see. It starts at August 27, 1951, to June 9, 1952.

Q. And that exhibit contains, does it not, the Sunkist selling price, for single strength Valencia orange juice, the so-called 260 numbered item?

A. Yes, it does.

Q. And the comparable numbered item sold under Exchange label—is it 53? A. 53.

Q. And all of the prices so circulated and contained in said exhibit for the year 1951 were determined by you, I take it, is that correct?

A. That is correct. [627]

Q. Please refer to Plaintiff's Exhibit 27—28, and tell the jury what that is.

The Court: You said "27—28"; which one are you talking about?

Mr. Dixon: I meant 28, the smaller one.

The Witness: 28 is a circular letter turned out by Howard Thompson, the sales manager of the

(Testimony of James A. Finley.)

Consumer Division. It is a letter to the brokers giving them the prices of Valencia orange juice for the year on August 3, 1951.

Q. (By Mr. Dixon): It also contains, does it not, any price changes made by Sunkist in Valencia orange juice after that date, and during the season in which single strength Valencia orange juice was sold during the year 1951 and '52?

A. From August 3, 1951, to November 30th, 1951.

Q. And it contains various bulletins, as you have described, namely, one commencing August 3rd, followed by one dated August 20th, September 4th, September 19th, October 8th, October 17th, and November 30, 1951? I am talking, Mr. Finley, about Exhibit 28.

A. I didn't check those dates with you, but there are a number of them here.

Q. Directing your attention particularly to the August 3, 1951, bulletin, No. 1, I notice that it refers to our opening prices on fancy California Valencia orange juice. Will you explain to the jury what is meant by your opening [628] price or the Sunkist opening price for California Valencia grade juice?

A. We hadn't canned any quantity to come out with a price to the trade up to this time, and this is August 3rd that we offered juice for sale.

Q. In other words, there was sufficient packed, shall we say, at that time for Sunkist to come out

(Testimony of James A. Finley.)

with an official opening price for its product, is that correct?

A. Yes, we had some in stock so we could make delivery.

The Court: You don't have any extra copy of 28?

Mr. Fisher: I am sorry I do not have. We will supply it.

Q. (By Mr. Dixon): Now, at the time Sunkist was selling single strength Valencia orange juice under the Sunkist label, the Exchange label, and was also offering it for sale to private buyers to be labeled under the private label of the buyer, was it not? A. Yes.

Q. Will you state to the jury what the opening prices were as circulated to the trade by Sunkist for 12/46's on August 3, 1951?

A. Price for Sunkist on August 3 for the 12/46 ounce size was two twenty per dozen in all states except California and Arizona, and two fifty a dozen for California and Arizona. The No. 53, the Exchange brand on 12/46 ounce was $2.13 a dozen except in California and Arizona, and $2.43 in [629] California and Arizona.

The Court: 12 is a case of this size, 12/46's?

The Witness: 12/46's, yes.

Q. (By Mr. Dixon): At that time the price of the Exchange or private label was the same, was it not?

The Court: The same as which?

(Testimony of James A. Finley.)

Mr. Dixon: That is $2.13 for the 12/46's outside California and Arizona, for that size.

Do you understand my question?

The Witness: The same as the price for the fifty-three Exchange was $2.13, and the price on the two-sixty, which is Sunkist, was $2.20.

Q. (By Mr. Dixon): I am sorry, I guess I didn't make my question clear.

Supposing someone wanted to buy private labeled pack from Sunkist, that is they would buy what we call brights or shiners, is that correct?

A. Yes.

Q. And have their particular label, let's say Ana-Gold, put on it. What would they pay under this price list if they made such a purchase?

A. If they made a purchase of the Sunkist, they would pay the $2.20 a dozen, less advertising allowance, less label allowance, and brokerage—not brokerage, and then on the 53 Exchange they would pay the $2.13 less brokerage, swell [630] allowance.

The Court: By 53 Exchange you mean that is the type of goods canned ordinarily under the Exchange label?

The Witness: Yes, non-advertised label Exchange.

Q. (By Mr. Dixon): I am not sure that I am clear, Mr. Finley. There is a difference, then, between the Exchange price, which of course is a can with a label Exchange on it, and the Exchange—or private label—strike that—and one with the private label, and they both seem to have the same

(Testimony of James A. Finley.)

price. I don't find in this price bulletin of August 3rd any reference to any label allowance to such a purchaser who might want to buy shiners or brights and have its own label placed on them. Do you find any there?

A. Not in this bulletin, no. [631]

Q. Well, does this correctly represent the selling price at which Sunkist offered to sell private label Valencia orange juice to the trade August 3, 1951?

A. We may not have had any bright stock to sell, and this covered what we had in inventory.

Q. In any event, this is your offering price, is it not, to such a buyer?

A. This is the opening price August 3, 1951.

Q. It is the same, is it not, that is, the price for the private label buyer is the same as the price for an Exchange label buyer? A. That's right.

Q. Do you recall what the TreeSweet single-strength Valencia orange juice was selling for on August 3, 1951?

A. No. I never did know what TreeSweet sold their canned orange juice for.

Q. It is a fact, is it not, Mr. Finley, that you did have some discussion with Mr. McCracken of TreeSweet or someone in TreeSweet concerning the opening price of single-strength Valencia orange juice?

A. We set our price at Sunkist at $2.20 and that is the price which we sold to him for.

Q. I understand that, but I am talking now about the price at which TreeSweet sold what it

(Testimony of James A. Finley.)

bought from, shall we say, Exchange Orange under this contract to the trade. [632]

A. Well, it set the price to him what we would sell to him for and as I remember it, he got a head start on us that year, and came out with opening prices before we did, because we did not have the stock.

Q. Now, will you answer my question, if you can? Did you have any discussion with Mr. McCracken or anyone from TreeSweet concerning the opening price of California Valencia orange juice for the year 1951 before such prices were issued to the trade by Sunkist?

A. I think I called him and told him what our price to him would be for juice for a limited period of time, but as to discussion of the opening prices, I did not discuss that with him. I told him what the price would be.

Q. About how soon prior to the issuance of the opening prices on August 3, 1951, did you have such a discussion with Mr. McCracken?

A. It was probably before he came out with opening price. I don't remember when he came out with them.

Q. Are you familiar, Mr. Finley, with the prices generally at which TreeSweet sells its single-strength Valencia orange juice to the trade?

A. Just what we hear back from the brokers. I do not know directly what he sells for.

Q. But by the time this bulletin was issued, the August 3 bulletin, you had advised Mr. McCracken

(Testimony of James A. Finley.)

of TreeSweet as to what the Sunkist opening price was going to be for Sunkist [633] Valencia orange juice, that is a fact, is it not? A. I think so.

Q. It was a pretty fast market for Valencia orange juice when Sunkist came into the market in 1951, was it not? You know what I mean by a fast market?

A. There usually is what we call the first time around to the customers. They are all waiting for the new pack juice and the first time around it is a pretty fast market.

Q. And it went out pretty fast, did it not, the amount that Sunkist had itself processed?

A. Yes. We had sold out what we packed very shortly after we came out with the price.

The Court: What do you two mean by a fast market? You seem to understand each other, but I don't know what a fast market is.

The Witness: I would consider a fast market is when you come out with an opening price. You call your brokers and they call the trade, and the stores want to have your brand on the shelf, so you have a lot of orders come in in just a very few days. A slow market is when the repeat orders are coming along, and they come in as it is sold off the shelf, but with the bare shelves, it goes pretty fast at first.

Q. (By Mr. Dixon): Of course, Sunkist did not sell any of the juice that had been processed, I mean sell itself to the trade any of the juice that had been processed by TreeSweet [634] under this contract, Exhibit 20, did it, Mr. Finley?

(Testimony of James A. Finley.)

A. No, it did not.

Q. That was all sold by TreeSweet to the trade?

A. Yes, it was sold by TreeSweet to somebody.

Q. Will you look at the bulletin dated December 4? The price of 12/46's in that bulletin was $2.35 a dozen, was it not, for Sunkist?

A. That is correct.

Q. And the previous price had been had $2.20— or what was it? A. $2.20 a dozen.

Q. This juice that had been put on the market by Sunkist under the August 3 bulletin had moved so fast that Sunkist had in fact had to withdraw from the market for that product temporarily, had it not?

A. Yes. We withdrew from the market because we had sold out our limited pack. We were spending all of our time on frozen concentrate.

Q. This bulletin, September 4, reads as follows:

Mr. Dixon: Ladies and gentlemen of the jury, I am just going to read parts of it to you. This is Bulletin No. 5, dated September 4, 1951.

"To Our Brokers:

"We are pleased to advise that we are again entering the market on California unsweetened Valencia orange [635] juice. Fresh fruit receipts increased considerably during the period we were withdrawn and shipments of orange juice have now closely approximated prior sales."

Then the last sentence or paragraph of this bulletin says, "With Florida juice in somewhat short

(Testimony of James A. Finley.)

supply, you should find many buyers eager to submit orders for prompt delivery."

Q. That is a fact, is it not, Mr. Finley, that the Florida juice, Valencia orange juice, so-called, by this time was considerably in short supply in the market?

A. The indications were that they were, because the price of Florida juice hit a low spot and then started increasing in the fall of the year, which is indicative of shorter supply.

Q. Now, directing your attention to Bulletin No. 12 dated October 8, 1951, will you state what the price of 260, that is the California Sunkist Valencia orange juice, was for 12/46's in that bulletin?

A. The Bulletin No. 12, 12/46 ounce No. 260 Sunkist was $2.50 a dozen out of the state, out of California and Arizona, and $2.80 a dozen in California and Arizona. [636]

* * *

Q. Did you have any discussion of any kind with Mr. McCracken of TreeSweet before this price bulletin was issued raising the price from the previous price charged by Sunkist for single-strength Valencia orange juice?

A. As Mr. Thompson and I would decide, and I would give him authority to raise or lower prices, I would immediately call Mr. McCracken and tell him what I decided to do, and that would be the charge that we would charge him from then on.

Q. What is the fact, if you know, as to what the

(Testimony of James A. Finley.)

price was at which TreeSweet sold its TreeSweet Valencia orange juice that it processed under this contract, Plaintiff's Exhibit 20, to the trade, on October 8th?

A. I don't know what price he sold for. All I know is what price we sold to him for.

Q. Did you ever get any price bulletins from TreeSweet?

A. I would see price bulletins from some of the processors through some of the brokers, but I don't ever remember seeing a TreeSweet bulletin. I don't know whether they turn them out or not.

Juror Wells: May I ask why the juice should be higher in California?

The Court: I was about ready to ask that question and then didn't. I don't think it has anything to do with this case.

Juror Wells: That is what I thought, too. [638]

The Court: Is there any charge made by the plaintiff on that?

Mr. Dixon: No.

The Court: I don't think it has anything to do with the case, but I thought you people would be curious.

Mr. Williams: We have no objection to the question. We expect to have that explained later.

The Court: Tell us, Mr. Finley, why you discriminated against our good citizens of California for our very excellent product?

The Witness: 90 per cent of the juice is produced in Florida, and as they ship it out here they

(Testimony of James A. Finley.)

are paying a higher freight rate, so what we do, we set a price that is as high, if not a little higher, because of quality—we think we have a better quality—and we get a little better price, so in California we set that price accordingly. And then as we go east they have got the freight advantage, and if we do want to sell East we have to go down a little.

If we sold at the same price—and I am sympathetic to California—if we sold at a lower price than Florida, we would be sold out in a month or two or three months' time, and then our good customers couldn't get it the year around.

Juror Wells: Thank you.

Q. (By Mr. Dixon): Now, Mr. Finley, I am going to ask you to do some computing, mathematically speaking. Do you [639] have your slide rule with you? A. Yes.

The Court: Do you want to use a slide rule, or be like the rest of the people and use a yellow pad?

The Witness: I have paper, too.

Q. (By Mr. Dixon): Please refer to Plaintiff's Exhibit 11, Item A. TreeSweet processed under Plaintiff's Exhibit 20, 24,148 tons of Valencia oranges that were made available to it under that contract. Let us assume a selling price to the trade of $2.50 a case for the 12/46's, that being your opening price on August 3rd to the California and Arizona buyers. By referring to Plaintiff's Exhibit 20—do you have it before you? A. No.

Q. Here it is.

(Testimony of James A. Finley.)

What discount or allowances were given to Tree-Sweet from that price?

A. In Exhibit 20, on page 2, paragraph 9, is the method by which the price of juice is determined. You start in with $2.50 a dozen, the price at which we sell to them——

Q. And the first thing that you deduct from that $2.50 price is a 15 per cent allowance, is it not?

A. 15 per cent is calculated on the gross sales price, so 15 per cent is taken off of the $2.50. [640]

Q. And that amounts to 37½ cents a case?

A. 37½ cents a case, correct.

Q. In addition thereto, 7 cents a case is allowed for advertising allowance, is it not?

A. 7 cents a case advertising allowance.

Q. And a label allowance of 6½ cents per case is also allowed from that price, is it not?

A. 6½ cents on the 12/46 ounce size.

Q. So that the total amount to be deducted from this $2.50 price when TreeSweet buys a case of this orange juice under contract Exhibit 20 is 51 cents per case, is it not, for the 12/46's?

A. The amount deducted?

Q. Yes. A. 51 cents a case.

Q. Yes. So that the total price that would be paid by TreeSweet for a case of 12/46's that it had processed would be $1.99, if my mathematics are correct? A. That is correct.

Q. It is a fact, is it not, that generally 23 cases of 12/46's juice equal a ton?

A. Approximately 23.

(Testimony of James A. Finley.)

Q. If you will multiply the 23 by $1.99 we get a figure, if this is correct, of $46.16?

A. What figure did you use? [641]

The Court: 23 times $1.99.

Mr. Dixon: I am informed that my multiplication is apparently in error.

The Witness: It is 45.77.

Q. (By Mr. Dixon): Now, that would represent, would it not, Mr. Finley, the actual amount which would be paid by TreeSweet for the single-strength Valencia orange juice which would be processed from a ton of oranges under this contract? I mean that would be the juice in the cans ready for sale, is that correct?

Mr. Williams: We object to this question, your Honor, because it is based upon an assumed price of $2.50, and there is no evidence showing that that is the actual price.

The Court: Counsel indicated that he is taking the example of the $2.50 price, which was the opening price for California and Arizona, and he is running this example through on that basis.

Mr. Williams: The basis of our objection relates somewhat to the purpose of this calculation.

The Court: Make your objection.

Mr. Williams: We object if the purpose of this, or the use of this calculation is in any way to establish damages. And we object to it on other grounds as being immaterial and irrelevant.

The Court: Overruled. [642]

(Testimony of James A. Finley.)

Mr. Dixon: Would you answer the question? Do you understand the question?

The Witness: Repeat it, please.

Mr. Dixon: Would you read it to him, please?

(The question was read by the reporter.)

The Witness: Yes, it would. [643]

Q. Now, under this——

The Court: Just a minute. Now, counsel has made the objection, which is very largely a general objection, that this is not to be considered on the question of damages. The jury will be instructed this is not plaintiff's demonstration to you to calculate damages, but he is making a demonstration to you involving a certain price on a certain date, and you may consider it for various purposes—intent, generally, as part of the case. If I understand counsel's objection, this is not some method by which you may calculate dollars and cents in damages should you find plaintiff entitled to recovery.

Does that satisfy you?

Mr. Williams: That is half of my objection, and the other is it is immaterial.

The Court: Well, I won't comment on that.

Q. (By Mr. Dixon): By referring to Plaintiff's Exhibit 20, Mr. Finley, paragraph 3, TreeSweet was to be paid all of the processing costs for processing the oranges made available to it under this contract by Exchange Orange, were they not?

A. That is correct.

Q. And by referring to Plaintiff's Exhibit 11,

(Testimony of James A. Finley.)

those amounts were reported to be by Exchange Orange $859,004.49. We will forget the 49 cents and deal with round numbers.

Would you divide the 24,184 tons into that figure and indicate to the jury what the result is? [644]

The Court: Will you read that question?

(Question read.)

Mr. Fisher: I think it should be 148 tons, Mr. Dixon.

The Court: 24,148.

Mr. Dixon: You are right. 24,148 tons.

The Witness: Approximately $36.60.

Q. (By Mr. Dixon): In other words, TreeSweet was paid by Exchange Orange approximately that amount for every ton of oranges delivered to TreeSweet under Plaintiff's Exhibit 20? Is that a fact, Mr. Finley? A. As far as I know.

Q. By subtracting that figure for the previous figure, 45.77, what result do you get?

The Court: What figure are you talking about?

Mr. Dixon: 36—what is the rest of it?

(Answer read.)

The Court: Mr. Williams?

Mr. Williams: We object, because the figure that is used, $859,000, is the total amount paid to TreeSweet for processing several different sizes of cans and is not the price paid for the 46 ounce can, while the calculation to date is being based solely on the

(Testimony of James A. Finley.)

46 ounce can. Therefore, the two figures are not comparable.

The Court: Objection overruled. Counsel's second computation is based upon tons and total cost, so that the [645] $35.60 figure has nothing to do with cases, that is true. That is a ton figure.

Mr. Williams: And it has nothing to do with $45.77, because it is based on all cases, not upon 46 ounce, and the other, the $45.77 price is based only on the 46 ounce case.

The Court: All right. I understand your objection, and if it is made as an objection, it is overruled, but I want the jury to understand this problem. Anything further?

Mr. Williams: No. May I have a continuing objection to this line of examination so I will not have to object to the questions?

The Court: You may have a continuing objection to this line of questions. I take it that will be based upon what your objections have been heretofore.

Mr. Williams: Yes, the previous objection and this one.

The Court: All right. Now, ladies and gentlemen of the jury, we don't want to make this any more complicated than we can. I want to understand as we go along and I want you to understand. All the TreeSweet juice which TreeSweet produced under this contract for itself with oranges supplied by Exchange was not in twelve 46 ounce cans. You understand that. And it was not all sold at $2.50 a

(Testimony of James A. Finley.)

case. You have got a lot of prices here. You have heard something a little bit ago on various ranges.

This $2.50 was the opening price in California and [646] Arizona. The U. S. price was $2.20 at that time. Then it ran up to $2.80 for California and Arizona. There are various figures involving various times and involving various size cases and involving California and Arizona as contrasted with other states.

Counsel, therefore, is trying to make a comparison for you, attempting to show you by an example from one price, one situation, what TreeSweet, as it were, was getting out of this, and consequently to make that comparison you would have to take one particular price and one particular size of cans.

Now, therefore, on the example he started out with, the 46/12 cans, assuming everything had been 46/12 cans, which it was not, and assuming everything had been $2.50 a case, which it was not, he reduced cases then into tons and arrived at this figure of $45.77 a ton for the oranges.

The other figure with which he is comparing it doesn't present that problem.

This first figure is certainly an arbitrary one limited to a particular example under certain suppositions. The second figure that he is using is arrived at a little differently. He took the total number of tons processed, and he took the total amount paid TreeSweet for processing. You heard the testimony. He arrived at a figure of $36.00 which TreeSweet got for processing this juice.

(Testimony of James A. Finley.)

Therefore, technically, Mr. Williams rightfully calls [647] attention to the fact that you have one figure arrived at in a certain way and a second figure arrived at in another way. They are both ton figures. Of the two, of course, the $36.60 figure, tons into total dollars, shows pretty well the figure of an average per ton. But the other figure is a comparative figure.

You could sit down and take another supposition. You could take a supposition juice was $2.20, and you could take another size can, and you could figure it out and make comparisons. That's all counsel is trying to do.

Or you could take a supposition that so much of one size can and so much of another, and so much was sold at this time and so much was sold at another time, and you would wind up with a lot of paper on your hands and you would get some varying results.

What I am trying to tell you is that this is being shown to you for the purpose of comparison, giving you an example, taking one size can and one price, which is fictitious. I want you to understand that, because they weren't all one size can and they weren't all one price.

Does that satisfy your thought, Mr. Williams?

Mr. Williams: Well, your Honor, frankly, I got lost. I am not sure whether I understood you.

The Court: You mean you got lost on what I was trying to tell the jury? [648]

(Testimony of James A. Finley.)

Did you understand me, ladies and gentlemen of the jury?

All right. Go ahead, Mr. Dixon.

Mr. Dixon: Thank you, your Honor.

* * *

Q. (By Mr. Dixon): Now, assuming, Mr. Finley, that we are dealing here only with 12/46's at the $2.50 price, by deducting the $36.60 from the $45.77, what figure do we get?

A. We get $9.17.

Q. Assuming then that all of the oranges, the 24,000 tons plus, were processed in 12/46's and sold to TreeSweet at the $2.50 price mentioned, it is a fact, is it not, that TreeSweet would have been paid for the oranges, without giving any credit to or adding to that whatever might be secured from the peel and the oil, oranges at $9.17 a ton? Is that the figure that you have? [649]

A. You say assuming these figures, the $859,000, and assuming that they are all 46's, if you assume they are all 46's why, that figure wouldn't come out 859 by any means. [650]

Q. It wouldn't come out what?

A. I say it wouldn't come out 859,000.

You are assuming that. But assuming your figures, it would come out $9.70 without oil and peel.

Q. Do I now understand——

The Court: Go ahead. First let me interrupt.

You understand what Mr. Finley is calling your attention to, that the total cost of $859,000 paid to

(Testimony of James A. Finley.)

TreeSweet was not a price based entirely on making cans in 12/46 size. They were paid for making canned juice in various sizes, and had the entire pack that TreeSweet made been in 12/46's, I take it you mean this figure would have been less?

The Witness: It would have been less.

The Court: The more variety of pack that you make the higher the cost, is that right?

The Witness: The smaller the can the higher the cost. And the No. 2 cans, 12-ounce cans, cost more.

Q. (By Mr. Dixon): So, assuming that TreeSweet just went in and bought these oranges from Exchange Orange or Sunkist, it would of course have the peel and it would have the orange oil, and any other by-product that might be recovered from the orange; is that a fact?

A. That is correct.

Q. And there is some recovery, is there not, to the processor for by-products when they process the orange into [651] single-strength juice?

A. Yes, there is income from the peel portion of the fruit.

Q. There is income, as I understand it, from the oil and the peel. Is that approximately the sole source?

A. Income from the peel. The oil is in the outer portion of the peel. And you have the income from the oil, and then the balance of it is what we call peel. But the oil is in the peel.

(Testimony of James A. Finley.)

Q. But that is recovered and sold as a by-product by the processor, is it not?

A. That's right.

Q. And in this case, that is, under the TreeSweet contract, TreeSweet was paid by Exchange Orange for that processing operation, were they not, and the oil was then turned over to Exchange Orange?

A. They were paid their cost of producing the orange oil, which is in paragraph 7 of Exhibit 20, at the rate of 22½ cents a pound.

Q. But the oil was turned over to——

A. To Exchange Orange.

Q. ——to Exchange Orange? A. Yes.

Q. And there was 152,097 pounds that Exchange Orange so secured from TreeSweet under this contract, did they not? [632] Refer to subdivision (e) of this exhibit and you will find the figure that I am talking about. A. That is correct.

Q. Will you state to the jury about what the value of that oil was per pound in 1951, approximately?

A. Well, the value of the oil in 1951—the sales price was $2.75 per pound.

Q. That was delivered in New York?

A. Delivered in New York. It is a national price.

Q. Is that the only place at which this oil is sold, New York?

A. Sold nationally at $2.75, even in Los Angeles. At one price.

Q. You mean that is one situation where they don't add the freight? A. Yes.

(Testimony of James A. Finley.)

Q. On the basis of that price can you tell the jury what should be added to this figure $9.17 for the oil?

A. The figure of $9.17, where do you get that?

Q. As I get it, that is 45.77 minus 36.60.

A. The $9.17 per ton?

Q. Yes.

A. The price of oil sells at $2.75 a pound, we have brokerage to pay on that, a container, and freight from here to New York, or freight from here to Chicago or any place [653] else.

Q. Would it run about $1.40 a pound recovered, per pound? A. A lot more than that.

The Court: Are you talking about the brokerage and freight, or the recovery?

Mr. Dixon: The amount recovered per pound from the oil processed and delivered to Exchange Orange under the TreeSweet contract.

The Court: Are you still talking about a net figure?

Mr. Dixon: Yes.

The Court: What does Exchange Orange get ultimately per pound of oil?

Mr. Dixon: That is correct.

The Court: After all expenses are paid out?

Mr. Dixon: Yes.

The Court: All right.

The Witness: $2.75, and——

Q. (By Mr. Dixon): You have expenses to pay on that, and costs, don't you?

(Testimony of James A. Finley.)

A. Yes. I am giving you the expenses now. 34 cents brokerage, and about 2½ cents container, and about 3 cents freight from here to New York. That is 39½ cents, call it 60 cents, off of the $2.75, or $2.15 net back to the growers. [654]

Mr. Fisher: Wouldn't that be 39, instead?

The Court: I get 39.

The Witness: I get 39, too.

$2.35.

Q. (By Mr. Dixon): I am sorry. I didn't get your figure.

A. It is $2.75, less 39½ cents, or call it 40 cents, which would bring it down to $2.35 per pound of oil back to the growers, as we term it.

Q. We have to also consider the peel, do we not, and its value? To whom did the peel go under this contract, Mr. Finley?

A. The peel under this contract went to a concern which specializes in just drying the peel——

Q. I am sorry. I mean who got the peel?

A. The Exchange Orange Products.

The Court: You still don't mean that. You mean who did the peel belong to?

Mr. Dixon: Yes, your Honor.

The Witness: The peel belonged to Exchange Orange Products Company.

Q. (By Mr. Dixon): And can you tell the jury approximately what the recovery net to Exchange Orange was on the peel, resulting from this contract?

A. The peel was sold at $2.08 a wet ton, there

(Testimony of James A. Finley.)

being [655] about two tons of fruit to make one ton of wet, so it would be about $1.04 per ton of fruit.

Q. So that if we add the recovery of $2.35 per ton for the oil and $1.04 per ton for the feed, to the $9.17 per ton figure that we previously referred to, we have a total of $12.56 per ton, is that correct?

A. You have got a figure of $2.35 per ton. It is $2.35 per pound of orange oil.

Q. I meant recovery per ton.

A. You haven't asked yet how many pounds of oil we have gotten per ton.

Q. I thought we had that figure, and that you had already figured it out. A. No.

Q. Do you have it before you, Mr. Finley, in this Plaintiff's Exhibit 11?

A. You have got 105,297 pounds, and 24.148 tons, and that is approximately 4.35 pounds per ton.

Q. Did you deduct the 22½ cents paid to Tree-Sweet for recovering the oil in making this computation?

A. No, I didn't. That should come off. It would be $2.35 less the 22½ cents. It brings it down to $2.12½.

The Court: A pound for the oil recovered?

The Witness: Per pound, yes.

Q. (By Mr. Dixon): Now, can you state to the jury, [656] with that figure what that recovery would have been per ton on the 24,184 tons processed by TreeSweet under this contract?

A. $9.25 per ton.

Q. For the oil?

(Testimony of James A. Finley.)

A. Which is $2.12½. Multiply that by the 4.35 pounds per ton.

The Court: That is 4.35?

The Witness: Yes, 4.35.

Q. (By Mr. Dixon): Is that the average recovery per ton for oil processed—I mean recovered when a ton of Valencia oranges is processed into juice, Mr. Finley?

A. It all depends upon the type of oil equipment or juice equipment that the juice is going through, and TreeSweet happened to have a machine which had very good oil yields.

Q. Will you state to the jury, if you can, what the recovery per ton is to Exchange Orange on its processing Valencia oranges, insofar as the recovery of oil is concerned?

A. On the same type of machine which TreeSweet used——

Q. Do you have the same type?

A. We had the same type in 1951—we would get approximately the same yields, four, four and half pounds per ton.

We had other machines which would just give us two pounds per ton. And we had other processes which we wouldn't get anything. [657]

Q. Do you mean you had three different types of machine, some that didn't recover any oil, some that recovered some, and some that recovered more?

A. Yes.

Juror Johnstone: What is a wet ton?

The Witness: Well, it is just a ton. I wanted to

(Testimony of James A. Finley.)

differentiate between a ton of peel and a ton of fruit. So it takes about—well, one ton of fruit makes about half a ton of wet, in a wet ton. It is about one-half peel, in other words, and we just call that a wet ton to differentiate it from a dry ton.

Juror Johnstone: That is why the wet ton is twice as much?

The Witness: Yes.

Juror Johnstone: Thank you.

The Court: So that I understand you, on certain machinery that you had that was the equivalent of the TreeSweet machinery, your recovery to Orange and, therefore, to the growers, was as much as $9.25 per ton for oil?

The Witness: Yes, if it sold at these prices, and on the same type of machine. [658]

The Court: So the $9.25 for this hypothetical example would have to be added to the $9.17?

Mr. Dixon: That's right.

The Witness: That's right.

The Court: Then the $1.04 for the peel, is that right?

The Witness: That's right.

Q. (By Mr. Dixon): The total amount is $19.46. is that correct, Mr. Finley? A. $19.46.

Q. So that, assuming the facts I have stated to you as the basis of my question before, if TreeSweet had bought the oranges processed here under this contract and had the benefit of the oil and the peel recovered therefrom, as well as the juice, on the

(Testimony of James A. Finley.)

basis of computations made, it would have paid $19.46 a ton for such oranges, is that correct?

A. With the assumption that this $9.17 figure is correct.

Q. Now, let me go back to this $1.99 case figure for the 12/46 ounce case, that being the price paid by TreeSweet to Sunkist for 12/46 case, selling at $2.50 a case, would that be on the basis of brights or shiners, Mr. Finley? In other words, you have already made a label allowance.

A. The label and advertising. The label allowance is in there so that would be on the basis of the bright stock.

Q. In selling this case of 12/46 to the trade, TreeSweet [659] would, of course, have to add to that price the cost of putting the TreeSweet label on each can in the case. A. That is correct.

Q. And your allowance under the contract generally is 6½ cents per case?

A. That is correct.

Q. And if TreeSweet advertised this product, it would add 7 cents a case for every case produced under this contract, would it not?

A. Advertising and promotional.

Q. In other words, this 7 cents per case was allowed by Sunkist to TreeSweet on every case processed under this contract regardless of the size, was it not? A. Yes, it was.

Q. So that those two figures would have to be added to the $1.99, which brings it up to $2.12½ per case, does it not? A. That is correct.

(Testimony of James A. Finley.)

Q. Now, of course, we have some selling expenses that have to be put on that. Perhaps brokerage, which may vary from 2 to 5 per cent, or is it fixed?

A. It varies with the different concerns, brokerage concerns.

The Court: Are you answering his question that it varies 2 to 5? [660]

The Witness: Yes. It varies—I don't know whether it varies within 2 and 5, but it varies, and approximately it would be 2 to 5.

Q. (By Mr. Dixon): We will add for selling cost, if that is a fair statement, 5 per cent, or 11 cents—5 per cent of $2.50 would be 12½.

A. 5 per cent is 12½ cents.

Q. So that brings the total cost to TreeSweet of this $2.50 a case to what figure?

A. You are calling that 5 per cent what? Sales or brokerage?

Q. Selling cost.

Mr. Williams: I object to this question as assuming that this figure states the cost to TreeSweet. There is no basis laid to show it does show the cost to TreeSweet.

The Court: This is again an arbitrary figure of $2.50. It is only an illustrative example.

Mr. Williams: May I have a continuing objection to the materiality of all this line of examination?

The Court: You may.

The Witness: It all depends upon what you have got included in this 5 per cent sales. You

(Testimony of James A. Finley.)

could have brokerage, which is a sales expense, cash discount, which is a sales expense, what we call swell allowance, and then the sales department's expense. All those should be added, and they would [661] add considerable as sales expenses.

Q. (By Mr. Dixon): I think that is correct.

A. So when you say 5 per cent for the sales expenses, I wondered if you meant that was sales expense or brokerage, or total.

Q. I don't know, Mr. Finley. I am asking you, is that a fair amount, do you think? What is the Sunkist percentage?

A. 5 per cent is not a fair amount for sales expense at all.

Q. What does the Sunkist Company allow for sales expense percentagewise?

A. What are our, or what are the expenses of sale?

Q. Per case, can you tell the jury, 12/46, if you can?

A. The total sales expense, 5 per cent brokerage, 1½ per cent cash discount, ¼ per cent swell allowance, and then 3 per cent is the figure we use for our own sales department, or 9¾ per cent, or about 24½ cents per case, with the case being priced at $2.50 per case.

Q. Let's assume that your figures are applicable. What do you get remaining as the figure, Mr. Finley?

A. $2.12½, add on the 24½ cents, and you come out with $2.47.

(Testimony of James A. Finley.)

The Court: That makes it 37.

The Witness: 37. Pardon me. $2.37.

Q. (By Mr. Dixon): Now, are there any items of expense [662] that haven't been considered in computing this figure, Mr. Finley?

A. There is still the storage and shipping. That is a cost to TreeSweet or any processor.

Q. This figure already represents, does it not, the processing cost and a profit on that operation which was assured to TreeSweet by the provisions of the 1951 contract?

A. The $1.35 per case was for manufacturing cost, and the 15 per cent—the $1.35 was presented to us as not including storage, so there is a clause in the contract to be able to store that without cost to us, assuming it would be within that 15 per cent. You can consider it in or out of it. It doesn't make any difference.

Q. In any event, TreeSweet was not going to lose on this deal, were they, if they sold the products that they bought from Sunkist at the same price as the Sunkist selling price?

A. No. They weren't going to lose on it. They were going to make a small profit.

Q. At least they were going to have a profit?

A. A profit.

Q. After all overhead and expenses were paid?

A. That is correct. [663]

* * *

Q. (By Mr. Dixon): Mr. Finley, referring to

(Testimony of James A. Finley.)

Plaintiff's Exhibit 11, Silzle processed a total of 163,326 cases of single-strength Valencia orange juice under its contract with Exchange Orange, Plaintiff's Exhibit 25. Of that amount 123,326 cases were 12/46's. By referring to Plaintiff's Exhibit 25 I find that the price paid by Silzle to TreeSweet for the——

The Court: Wait a minute. Silzle to TreeSweet?

Mr. Dixon: To Sunkist. Thank you, your Honor.

Mr. Williams: Exchange Orange, your Honor.

Q. (By Mr. Dixon): Yes, Exchange Orange, for the 12/46 ounce cases processed and purchased by it thereunder, vary from $2.20 a case to $2.80 a case, is it? Or do we stop at $2.50?

A. It varies from $2.20 a case to $2.65 a case under this contract.

Q. Taking the B price of $2.20 a case and the figure of .4036 cents per case, as being the amount paid by Silzle to Exchange Orange for any juice purchased under the B arrangement, can you state to the court what that would amount to per ton for juice on the basis of 23 cases to a ton of 12/46's?

A. $13.28 per ton, if it is with the figure of 23 cases per ton.

Wait a minute. Pardon me. It comes out [665] $9.28.

Q. So if Silzle had paid for the oranges on a dollar basis per ton for the juice processed therefrom, that would have been the price paid, plus whatever recovery there might have been for the orange and peel under the $2.20 per dozen charge,

(Testimony of James A. Finley.)

is that correct? A. That is correct. [666]

Q. Now, directing your attention to the $2.50 price under the 12/46 ounce size, the contract provides the rate per case to be paid Exchange Orange for the fruit is .6661 cents per case. Can you jury what that amounts to per ton?

Mr. Stark: That is 66 cents.

Mr. Dixon: .6661. I am using the decimal point to indicate the difference between dollars and cents figures, because this is easier for the reporter, I think.

The Court: That is 66 cents and 61/1000ths of an additional cent.

The Witness: $15.32.

Q. (By Mr. Dixon): Now, Silzle was paid at the rate of $1.35 per case by Exchange Orange for manufacturing cost incurred by it in processing the oranges under this contract, and this particular provision, the C provision thereof, was it not, Mr. Finley? A. Yes, it was.

Q. Can you tell the jury approximately what amount that would have been per ton paid to or allowed to Silzle by Exchange Orange for manufacturing cost?

At. At the rate of $1.35 per case, roughly 23 cases per ton, would come out $31.00 per ton. [667]

* * *

Q. (By Mr. Dixon): Referring to the C price in the Silzle contract, Plaintiff's Exhibit 25, and the selling price of a case of 12/46 ounce cans at

(Testimony of James A. Finley.)

$2.50 per case, will you state to the jury what the deductions were, total deductions were that were provided for in said contract for sales expense, brokerage and profit, 12½ per cent, label allowance, manufacturing cost, and advertising allowance and trucking? [668]

A. You want the total figure?

Q. Yes, if you will take the——

A. I will just add them up.

Q. Take the $1.35 figure, the 5.4 cent figure, and the 7-cent figure, and the trucking figure only, including the .3125.

A. Excluding the sales expense?

Q. Yes.

A. That would be $1.52 and 14/1000ths, [669] 1.5214.

Q. And if you add to that the cost of the fruit of 66 cents plus per case, what total do you get?

A. $2.1875.

Q. So that excluding sales expense, brokerage and profit, so-called, on this item, there remains 31¼ cents per case to be allowed Silzle for those items under this contract, is that a fact?

A. That is correct.

* * *

Mr. Dixon: Plaintiff's Exhibit 29 offered in evidence.

Mr. Williams: No objection.

The Court: 29 received in evidence. [670]

* * *

(Testimony of James A. Finley.)

Mr. Dixon: * * * May it be stipulated by and between counsel that there is nothing contained in the minutes of the executive committee of Exchange Orange or of the Board of Directors of that company, which in any way refers to, deals with, or approves the [671] Plaintiff's Exhibit 25, the contract with the E. A. Silzle Corporation?

Mr. Williams: Is there any reference in those that we furnished you?

Mr. Dixon: None whatever.

Mr. Williams: There were none, then.

Q. (By Mr. Dixon): Directing your attention, Mr. Finley, to Winekler & Smith, I believe you testified that the processing plant of that company was adjoining to or adjacent to the Silzle plant in Anaheim? A. That is correct.

Q. Are you familiar in any way with the selling price at which Winekler & Smith sold its products, particularly Valencia single strength orange juice, prior to the year 1951?

A. Just what I heard through the sales department.

Q. And from whom did you get any information concerning it?

A. Usually through Howard Thompson who has charge of the consumer goods sales. He is the one that talks to the trade. [672]

Q. And what did he tell you with reference to the Winekler & Smith prices, if anything?

A. Well, he said they jumped around an awful lot. He couldn't pinpoint, he couldn't find out what

(Testimony of James A. Finley.)

their price was, but in general they were probably a little lower.

The Court: Lower than what?

The Witness: Lower than the Exchange or Sunkist price.

Q. (By Mr. Dixon): It is a fact, is it not, that the Ana-Gold brand, under which the Winckler & Smith Valencia orange juice was sold, was generally sold to the trade at a lower price than the Exchange Orange product?

A. Yes, it was generally expected that the Ana-Gold and Silzle and the Case-Swayne prices were lower. We just expected it, so we didn't think anything about it.

Q. Have you ever had occasion to have Exchange Orange check or analyze the single strength orange juice processed and sold by Winckler & Smith in interstate commerce from the years 1949 to 1950? A. I never did have.

Q. Did you ever have anyone in Exchange Products do it under your supervision and control?

A. I don't think anybody ever did it unless they did it as an individual, as a chemist who would be curious, but they never reported it to me.

Q. So that Exchange Orange had no records of any examination [673] having ever been made of the single strength Valencia orange juice processed by Winckler & Smith during the years 1949 and 1950? A. No, we didn't.

Q. Now, were you ever inside the Winckler &

(Testimony of James A. Finley.)

Smith processing plant at Anaheim during the years 1949 and 1950?

A. I don't remember whether I was or not. I remember being in there the latter part of 1947. Whether I was in there after that, I don't remember.

Q. Was anyone from Exchange Orange, to your knowledge, ever requested by you to go in and take a look at the facilities or the plant of Winckler & Smith during the years 1949 and 1950?

A. No.

Q. Did anyone from Sunkist, to your knowledge, ever do so during those years?

A. Not that I know of.

Q. Now, directing your attention to the year 1951, Mr. Finley, did you have occasion during that year at any time prior to the commencement of the processing season for the Valencia crop to inquire into or determine what the facilities of Winckler & Smith were for processing single strength Valencia orange or any other product?

A. No, I didn't.

Q. Did you know that Winckler & Smith had added some [674] facilities to their plant in 1949 and 1950 for processing frozen citrus juice products?

A. Yes. I heard where he changed over his vacuum pan by his own design to a vacuum pan to make lowtemp, but I never heard much more about it.

(Testimony of James A. Finley.)

Q. Mr. Finley, I am talking about Winckler & Smith now, not about Mr. Winckler.

A. All right. Winckler-Smith Corporation then.

Q. You say you heard something about Winckler & Smith having put in some pan or something that you refer to for processing frozen citrus juices?

A. Yes. I heard it was a pan of his own design.

Q. When was lemonade first produced from citrus products, that is, lemons, made and sold? I am talking now just about lemonade, not a frozen concentrate? A. The frozen lemonade?

Q. Not the frozen kind. Just the regular lemonade. A. The shelf item lemonade?

Q. I beg your pardon?

A. What we call a shelf item.

Q. Yes, just a shelf item.

A. Non-frozen. Oh, I think there was some of it being produced by some companies even before, oh, 1940, and then during the war, with the sugar shortage, a lot of us went out of it and then it started in after sugar got plentiful again, so it would be 1945 and 1946 it started again. [675]

Q. Do you know whether Winckler & Smith was producing and selling any lemonade in interstate commerce in the years 1949 and '50?

A. I couldn't say one way or the other. I don't know.

Q. Did you at any time hear anything about Winckler & Smith in 1951 issuing any additional stock for the purposes of expanding its facilities?

(Testimony of James A. Finley.)

A. I don't remember whether I heard it during the year or after the lawsuit was started. It may have been during the year that I just heard it, but I didn't know the detail of it.

Q. Do you know from whom you might have heard it, Mr. Finley?

A. I don't remember whether I heard it or not. I heard it sometime around that period. It may have been after this lawsuit was started.

Q. These contracts that we have referred to with TreeSweet and Silzle, did you have any occasion to discuss the credit of either of those companies with Mr. Wilcox, before Exchange Orange entered into those contracts?

A. No, I don't remember of it.

Q. If I recall your answer, if I have asked this question, you did not inquire into the financial condition or credit condition, that is, as to whether Silzle was a credit risk, prior to the time you entered into the contract with [676] that company?

A. No, I did not.

Q. And you did not discuss that company with Mr. Wilcox? A. I did not.

Q. Or anyone else in Exchange Orange?

A. No.

Q. Did you during the year 1950 have any occasion to discuss—1951, instead of 1950—have any occasion to discuss the credit or financial condition of Winckler & Smith with Mr. Wilcox?

A. I didn't discuss it, but it was common knowledge——

(Testimony of James A. Finley.)

Q. No. You answer my question now.

A. I don't remember discussing it with anybody.

Q. Well, did you discuss it with Mr. Armstrong at any time in 1950?

A. No, not that I remember.

Q. Or Mr. Kelly?

The Court: Are you talking about 1950 or '51?

Mr. Dixon: I am sorry. 1951, Judge. I am sorry.

The Witness: It would be out of one of those departments that they would tell me as to the terms which they sold fruit on; but to specify which one told me, I couldn't do it.

Q. (By Mr. Dixon): I don't believe I have an answer to my question, Mr. Finley. My question is, did you have any occasion at all during the year 1951 to discuss the credit [677] or financial condition of Winckler & Smith with anybody in Exchange Orange or Sunkist?

A. I don't remember of it.

Q. Did Mr. Wilcox ever discuss with you in 1951 any conversation that he had, had with Mr. Winckler of Winckler & Smith concerning the securing of oranges on some basis from Exchange Orange or Sunkist?

A. I don't remember him mentioning it to me.

Q. Did you have a conversation with Mr. Kelly of Sunkist concerning any conversation that he might have had with Mr. Winckler of Winckler & Smith concerning that company securing oranges under some arrangement with Sunkist?

A. I don't remember him mentioning it to me.

(Testimony of Wendell K. McCracken.)

Pack Canned Orange Juice sold by TreeSweet from April 11th through April 30, 1952.

It would show the number of units in inventory, the processing cost per case, the processing cost to be recovered from Exchange Orange Products Company, and the gallons involved.

Evidently there was due EOP Company a net of $3,400.37.

I do not understand that, I am sorry, about credit memo reducing account RC from EOP for processing.

This was prepared by our accounting department and it isn't very clear. But this shows the processing cost to be recovered from Exchange Orange Products.

Q. Do you know or can you tell from this exhibit [775] whether that amount was deducted from the total purchase price that might be due Exchange Orange for the Valencia juice purchased, or otherwise acquired, by TreeSweet under the contract with Exchange Orange in '51?

A. I would assume so, sir, because I notice here the check to EOP Company herewith with a net amount after a deduction.

The Court: Is it your testimony that generally the credit was offset, or did money come to TreeSweet from Exchange Orange for the processing, and then did money go back for the purchase of the goods? Or were they crossed off pro rata to the extent that they would cross of by credit memos?

The Witness: Your Honor, I believe that the

(Testimony of Wendell K. McCracken.)

latter is correct. I think our purchase of orange juice under the option agreement made us owe Sunkist or Exchange Orange Products Company more than they owed us for processing, so I think we were paying the net amount as shown by these figures that we are looking at, the difference between the amount they owed us and we owed them. I think there was just one check that changed hands.

The Court: You mentioned several checks. You mean one series of checks? The checks all went one way, is that what you mean?

I understand you already to have testified to several different checks here, not one check. [776]

The Witness: Frankly, I don't understand that myself. I believe the checks followed the purchase orders. These sheets here are our purchase orders when we brought juice from Sunkist.

Q. (By Mr. Dixon): Will you examine Plaintiff's Exhibit 35, Mr. McCracken, and indicate whether that represents the wind-up and settlement of the pack processed by TreeSweet under the 1951 contract with Exchange Orange?

A. It does, because Purchase Order No. 6739 states, Final purchase of 1951 Valencia single-strength orange juice packed for account of EOP Company by TreeSweet. And this, I would assume, represents the taking down or the exercising of our option to purchase the balance of our pack, which we were required to do, you remember under the agreement by June 1 of '52.

(Testimony of Wendell K. McCracken.)

Q. I would like to have you refer to that part of the exhibit being No. 6739, and part of Plaintiff's Exhibit 35, which reads as follows: All juice located in eastern warehouses unsold on 5/26/52 has been purchased at eastern prices. Only 48/6 ounce remained in California warehouses as of 5/26. We estimate that only 7 per cent of this will be sold at 55 cents per dozen, and the balance of 93 per cent will go at 60 cents. Settlement is, therefore, based on this estimate agreed upon with Arvel Smith by telephone today.

Can you state to the jury what is meant by this telephone conversation with Mr. Smith concerning the prices at [777] which the balance of the stock remaining in the TreeSweet warehouses on May 26th was to be sold?

A. Yes. You will recall that throughout the 1951 pack year and the sale of that pack into the 1952 calendar year, Sunkist and TreeSweet had two prices, one for eastern buyers and one for western buyers, which has been referred to previously. When it came to the final settlement date of June 1st, on which date we had to pay for and take delivery of the amounts still on hand which we had not previously purchased from Exchange Orange Products or Sunkist, then it became a matter of determining at which price, the eastern price or western price, we were going to pay for that merchandise. So this was finally agreed upon for that which was still on hand but not sold. We were trying to determine where it could be sold, whether it would be

(Testimony of Wendell K. McCracken.)

sold east or west. So evidently our Mr. Taylor, and Mr. Smith of EOP, decided that all of the juice located in our eastern warehouses of the 6 ounce size would be presumed to be sold at the eastern price, and the 48/6 ounce size that we have in California, 7 per cent of that was to be sold in the eastern market at 55 cents a dozen, and the other 93 per cent would be sold in California at the 60 cents or higher price. [778]

Q. In other words, these prices, 55 cents and 60 cents, were the prices at which TreeSweet expected to sell the merchandise or juice referred to therein, is that correct? A. That is correct.

Q. And those prices, 55 cents and 60 cents, are also the prices which TreeSweet paid, in fact, to Exchange Orange for the balance of this pack under this arrangement, is that correct?

A. Less the deductions, yes, sir.

The Court: You say after the deductions?

The Witness: Less the deductions. That was the gross price, the selling price.

The Court: Now, I am in doubt here. Does this refer to cases, these figures of 55 and 60 cents refer to cases?

Mr. Dixon: Dozens.

The Witness: Dozens, sir. It may be confusing. All juice is quoted by the dozen. This 48 cans to the case represents four dozen, so it is four times 55 or 60 cents mentioned.

(Testimony of Wendell K. McCracken.)

The Court: So these were small cans?

The Witness: That's right.

The Court: Which would retail for—what were the figures there—55 or 60 cents a dozen?

The Witness: Wholesale.

The Court: And it took four dozen of those to make a [779] can?

The Witness: Yes, sir.

The Court: So that the case price would be four times that for the small cans?

The Witness: That is correct.

The Court: All right.

Q. (By Mr. Dixon): In other words, the 55 cents per dozen would be $2.20 for a case of 48/6's?

A. That's right.

Q. And that price of 55 cents per dozen and 60 cents per dozen was not the price actually paid, was it? In other words, from the 55 cents and 60 cents per dozen were deducted the various allowances, such as 7 cents a case for advertising allowance, 15 per cent from the gross, and so forth, provided for in the contract, is that correct?

A. That is correct.

Mr. Dixon: May it be stipulated, counsel, that the oranges delivered to TreeSweet under the 1951 contract with Exchange Orange had an average soluble solids content of 131.6 pounds per ton?

Mr. Williams: Is that the figure in the TreeSweet answers to interrogatories?

Mr. Dixon: That is the figure, counsel.

Mr. Williams: Then we so stipulate.

(Testimony of Wendell K. McCracken.)

The Court: All right. Stipulation. [780] accepted.

* * *

Q. * * * Did TreeSweet purchase and pay for with cash any Valencia oranges from Sunkist at any time during the year 1951? A. No, sir.

Q. Did TreeSweet purchase any oranges from any other source, Valencia oranges, during the year 1951? A. We did.

Q. Can you state to the jury the approximate tonnage so purchased and the approximate time of said purchases?

A. During the 1951 season, we purchased for cash from other than Sunkist 1,114.105 tons of oranges from other people, growers, direct from growers and from other packing [781] houses not affiliated with Sunkist.

Q. Can you state to the jury approximately when those purchases were made, Mr. McCracken?

A. Those purchases were made in the latter part of October or the first few days of November at the time we were finishing up our pack.

Q. And what was the occasion for making those purchases?

A. At the beginning of each season we budget our pack, and we were short of our budget on one size, the same six-ounce individual serving can that we mentioned before, and we wanted to finish out our budget and, as I recall it, the Sunkist supply of fruit got down to a point where they could handle it or wanted to handle it all in their own

(Testimony of Wendell K. McCracken.)

plant, and we wanted to keep running long enough, our plant running long enough to pack the balance of our budget on that particular size.

Q. So that these purchases were made after you had in fact finished the pack for Sunkist, is that correct?

Mr. Stark: Your Honor, I object to the form of this question as leading.

The Court: Overruled.

The Witness: Shall I answer the question?

The Court: Yes, sir.

The Witness: I believe these purchases were made at the same time we were finishing up our pack for Exchange Orange [782] Products Company, because my notation from our accounting department states that the agreement with Sunkist lasted until November 8th, the last day of our pack, so I think the 1,114 tons supplemented the supply of fruit we were getting in a smaller way from Sunkist.

Q. Can you state to the jury what price, approximately what price you paid per ton for those oranges that you acquired at that time?

A. We paid an average price, according to our records, of $32.97 per ton for the 1,114 tons we purchased at that time, and as far as I know, that was the price delivered at our plant.

Q. That is to say, that was the delivered price?

A. Yes, sir.

Q. To your plant? A. Yes, sir.

(Testimony of Wendell K. McCracken.)

Q. Now, Mr. McCracken, are you familiar with the costs of operation and—strike that.

Are you familiar with the manufacturing costs for processing a ton of Valencia oranges into single-strength juice as they were in effect and applied to your plant in the processing season of 1951?

A. Yes.

Q. Can you state to the jury approximately what those costs were per ton? [783]

A. I am sorry, sir, but we do not figure our costs on a ton basis. We know 23 cases, approximately, make a ton, but we figure all our costs on a gallon basis. I have them on a gallon basis.

Q. That's fine. I think maybe by this time we can understand that. The average ton will produce about 100 gallons?

A. Approximately, yes, sir.

Q. And 100 gallons will make about 23 cases of 24/2's? A. That's right.

Q. Is that correct?

A. No. 23 cases of 12/46's.

Q. 12/46's? A. That's right.

Q. On that basis, can you indicate what the manufacturing cost would be per case of 12/46's?

A. Depending on the volume run in the plant, the volume run in the plant materially affects your cost, because your overhead costs the same no matter whether you run large or small volume.

Q. In other words, your overhead goes on whether you are processing or not?

A. Right.

(Testimony of Wendell K. McCracken:)

Q. Is that an important factor in determining the cost of operations? [784]

A. Most important.

Q. Can you proceed from there now?

A. The cost—I am looking at one of your exhibits, which is our agreement with EOP in 1951, which has attached to it the list of charges, processing charges, we were to be paid, based upon the volume of fruit furnished to us by EOP. I believe that shows that the processing cost of packing a case of 46 ounce is $1.37 based upon the volume we ran that year, 2,400,000 gallons, and over on the right-hand side called for processing fees to be paid to us by Sunkist, EOP, of $1.37531 per case.

Q. Can you tell the jury what the cost of the juice would be per ton on the basis of the $33 fruit that you purchased?

A. About 33 cents, and there are 4.31 gallons of juice in a case of 46 ounce.

Q. Approximately what does that total? I don't have the figures.

* * *

Q. (By Mr. Dixon): By 33 cents, Mr. McCracken, you mean 33 cents a gallon?

A. Yes, sir.

Q. And there are four and approximately three-tenths gallons in a case of 12/46's, is that correct?

A. Yes, sir.

Q. So that the juice cost on the basis of $33 a ton, per case, would be 33 cents times 4.3 and some

(Testimony of Wendell K. McCracken.)

fraction, which is approximately $1.42 a case, I believe?

A. That is correct, $1.42 according to my figures.

Q. And that, added to the $1.37 per case gives us about $2.79 a case? A. Correct.

The Court: I am lost again. You must not be talking about the thousand tons, then.

Mr. Dixon: No. I left the thousand tons, Judge. I am now talking——

The Court: About the cost of the juice that went from Exchange Orange to TreeSweet?

Mr. Dixon: I am talking about the juice that came from the thousand tons plus that TreeSweet bought—I mean the oranges, thousand tons of oranges that they bought and paid $33 a ton for, which would mean that the juice per gallon—per ton, would cost about 33 cents a gallon.

The Court: Which figured $1.42 a case? [788]

Mr. Dixon: That is right.

The Court: Now you are adding to that——

Mr. Dixon: The manufacturing cost of $1.37.

Q. (By Mr. Dixon): That was the cost provided for in the TreeSweet-Exchange Orange contract in 1951, was it? A. That is correct, yes.

Q. Can you state to the jury whether that price, or cost, provided for any manufacturing profit to TreeSweet from the processing operation?

A. It did not, no, sir. The $1.37 cent processing charge made to EOP by TreeSweet did not include a profit. It was an estimated actual cost.

Q. So before we get to the selling cost, if any,

(Testimony of Wendell K. McCracken.)

for what you produced from this thousand tons that you paid $33 a ton for, we are already, are we not, in excess of any selling price at which TreeSweet sold any of the Valencia juice that it processed under the TreeSweet-Exchange Orange Products contract in 1951?

Mr. Stark: I object to the form of the question as being leading and argumentative.

The Court: Overruled.

Mr. Dixon: You may answer, if you can.

The Witness: Sir, you have my only price bulletin that I have for 1951, and I haven't got it in front of me or in my mind. [789]

We started out with a price of $2.50 and $2.99, East and West, and I haven't got it before me. Exhibit 36, I think it was, the yellow sheets.

Q. (By Mr. Dixon): By referring to Plaintiff's Exhibit 36, I believe, the highest price at which TreeSweet offered any single-strength juice to the trade in 1951 and 1952, the end of that pack, was $2.80 a case for the 12/46's.

* * *

The Witness: As far as I can see, that is correct.

The Court: If I don't understand, I suppose the jury doesn't, and I don't understand.

On the first page of this Exhibit, Exhibit 36, it shows price per dozen 12/46's ex-warehouse distributing points $2.99. Can you explain? Because the witness says the highest price was—what did you say?

(Testimony of Wendell K. McCracken.)

The Witness: May I explain that, your Honor?

The Court: Yes. [790]

Mr. Dixon: Would you explain that? It appears from the price list——

Mr. Stark: If I may interrupt there, your Honor. I think the confusion arises from the fact that the $2.20 price is f.o.b. plant. The other price is the price ex-warehouse in the East, which naturally includes the freight from the plant to the warehouse.

Is that correct?

The Witness: That is correct. The ex-warehouse—we sell orange juice on two different plans; one of which we sell it f.o.b. our plant in Santa Ana, and it is shipped out and we charge the buyer the f.o.b. plant price, and it goes out freight collect and he pays the freight on it, the buyer does. Then we have another method of selling, which is customary in the canned goods business. We carry a warehouse stock of our citrus juices in Chicago or New York, and we pay the freight on that car that goes out. All of our shipments are made in carloads or pool car lots. So that the merchandise in the warehouse in New York or Chicago, we put what we call an ex-warehouse Chicago or New York price on that, which includes the freight, which is added to our f.o.b. plant price, and which also includes the warehouse's cost.

The Court: So that those prices, then, ex-warehouse, are both the price you are charging for the fruit plus freight? [791]

(Testimony of Wendell K. McCracken.)

The Witness: That is right.

The Court: I take it you all know what f.o.b. means, free on board. Is that right?

The Witness: Free on board.

The Court: That clears it up in my mind. I am sorry.

Mr. Dixon: I am not sure whether we had a question pending, Mr. Reporter.

(The following portion of the record was read by the reporter: "Q. By referring to Plaintiff's Exhibit 36, I believe, the highest price at which TreeSweet offered any single-strength juice to the trade in 1951 and 1952, the end of that pack, was $2.80 a case for the 12/46's.")

Q. (By Mr. Dixon): Was that the highest price, according to the TreeSweet price lists, at which TreeSweet offered for sale any single-strength Valencia juice from the '51 pack processed under the Exchange Orange-TreeSweet '51 contract? A. Yes, sir.

Q. If my computations are correct, Mr. McCracken, TreeSweet must have lost money, if it sold any of the juice processed from the thousand tons that you purchased at $33 a ton, and processed into single-strength juice during the 1951 processing season; is that a fact?

A. That is not a fact. [792]

Mr. Stark: I object. I move to strike the answer for the purpose of an objection.

(Testimony of Wendell K. McCracken.)

The Court: It may go out. What is your objection?

Mr. Dixon: Well——

The Court: Just a minute.

Mr. Stark: I object, first, to the form of the question as leading and argumentative. But, secondly, to the fact that it assumes facts contrary to the evidence. The witness testified that this thousand tons was purchased for $33 to make 48/6's, and the rest of the hypothetical question has gone on the costs of processing 12/46's, which is a different can size, and we have no evidence in the record that the costs are the same.

The Court: Maybe that is just what the witness was going to explain. He has already answered that he hadn't lost any money, and he started to explain when you objected.

I will overrule the objection and let the witness answer.

You may explain.

The Witness: That is exactly right, sir, that was my point. I had previously testified that we bought 1100 some odd tons, because we were short on our budgeted pack of 48/6 ounce cans. In the 6 ounce size your cost of juice per gallon is a lot less—your can cost on a gallon basis of the little cans is a lot higher per gallon than the can cost of the large 46 ounce, which we call the family size. So that [793] you have lesser proportionate costs in the 6 ounce size of juice and heavier costs on cans, cartons, and even labor.

(Testimony of Wendell K. McCracken.)

Q. (By Mr. Dixon): Mr. McCracken, of course what I am trying to determine is, so that the jury may understand your operations under this contract, could you have paid $33 a ton for the 24,000 tons of oranges that you processed under the Tree-Sweet-Exchange Orange contract in '51, and sold that at a profit, based upon the selling prices at which TreeSweet did sell its juice packed under that contract in 1951? A. No.

* * *

The Court: All right. We will take a recess now.

Before you go, when I instruct you, one of my form instructions is that when I ask questions, that doesn't indicate that I have any view whatsoever about the facts. I am just trying to understand the matter as I go along. So don't draw any assumptions from questions that I ask as to any view that I might have as to the facts. That is not my business, for me to decide the facts. I think it is my business to try to understand that.

And I also apologize for being so dumb. Just because [794] you sit on the bench as a judge, that doesn't mean you know everything by any [795] means.

* * *

(Testimony of Wendell K. McCracken.)

Cross-Examination

By Mr. Stark:

Q. Mr. McCracken, this morning you testified that the majority of your product was sold under the TreeSweet label. Does that apply to the Florida, as well as your California pack? A. It does.

Q. Does the Florida pack carry any additional trade-mark identification on it, or is it indistinguishable from the California pack?

A. It is distinguishable. The difference is by a different color label, and very much identified by large letters on the can that it is Florida pack. Some people prefer our Florida pack, some our California pack.

Q. In answer to one of Mr. Dixon's questions regarding your principal supplier of Valencia oranges, you stated that Sunkist Growers and Exchange Orange was your supplier. In making that answer, did you have in mind your Florida operation?

A. I was not considering the Florida operation. Probably that answer was in error, without giving consideration to the Florida operation.

Q. You have a separate local Florida source for that [796] operation? A. We do.

Q. Comparatively, is your Florida pack or your California pack of single-strength juice, or was it in 1951, the larger? Which?

A. In 1951, I think our California pack was slightly larger, but today our Florida pack is larger.

(Testimony of Wendell K. McCracken.)

Q. Now, you indicated this morning that you had had prior contracts between TreeSweet and Exchange Orange in substantially the same form as the 1951 contract which is in evidence. When, if you recall, did those contracts first start?

A. In 1947.

Q. 1947 was the first contract between yourself and Exchange Orange? A. It was.

Q. Calling your attention to the season 1947, did you pack all of your single-strength juice under this predecessor contract, or did you buy some of the fruit?

Mr. Dixon: If the court please, I have no objection to the question, but I think the direct examination did not go back to 1947. It seems to me it is wholly irrelevant, unless counsel has some preliminary reason for his question. I object to any cross-examination as to anything in 1947 which was not gone into on direct examination with this [797] witness.

Mr. Stark: Your Honor, as I understand it, these contracts and the background purpose for entering them were a very definite part of Mr. Dixon's case. He started with the last contract and led us back a little ways, and then left us on the edge of the cliff, and I am simply trying to go back to the time they started.

The Court: Well, you understand his objection. You are a pretty good lawyer.

Mr. Stark: Yes.

The Court: You objected, to start with, and

(Testimony of Wendell K. McCracken.)

made him call this man as his witness. Now he is saying in substance that you should call this man your witness if you want to go into this matter.

Mr. Stark: No. He has testified there were prior agreements and they were in substantially the same form. He has now testified the first of those prior agreements was 1947.

The Court: I will sustain the objection, but you are privileged to go into the matter. All you have to do is make this man your witness, just like you made Mr. Dixon make him his witness when the matter first arose.

Mr. Stark: We will, of course, take our witnesses in the normal course of the trial.

Q. Mr. McCracken, you gave a pack figure for 1951, total pack of some 2,400,000 gallons. Did that figure include your Florida operation? [798]

A. It did not. All of my testimony had to do with only California operations.

Q. You recall on Exhibit 35, as to which you were examined, there was contained the statement, "Settlement is therefore based upon this estimate" —that is the 55 cents or 60 cents sales price on the final inventory—"agreed upon with Arville Smith by telephone today."

I believe you testified that the price that was agreed upon was the price which was to be the basis of your payment to Exchange Orange, is that correct? A. That is correct.

Q. And it did not relate or purport to be an agreement by Arville Smith of Exchange Orange as

(Testimony of Wendell K. McCracken.)

to the price that you were or were not in fact to sell the product for? A. No, sir.

Q. As a matter of fact, do you know whether those products were in fact sold for 55 cents or 60 cents in the proportion which you stipulated?

A. I do not. That was an estimate. [799]

Q. Simply for the purpose of closing out the contract year? A. Final accounting.

Q. Mr. McCracken, you testified that in 1951 you purchased 1100 some odd tons of fruit from sources other than Sunkist or Exchange Orange. Did you have any difficulty in obtaining this fruit?

A. I do not recall, but I do not think we did.

Q. In Mr. Dixon's computation he asked you what the cost per gallon of juice was from the $33 fruit, and you answered 33 cents a gallon. In giving that answer did you include any credit for peel or oil?

A. I did not have a chance to do that. I thought about that later. It was not included at all.

The way we carry our cost, if the fruit cost $33 a ton, and we get back 4½ pounds of oil per ton, we get back a dollar or two dollars or three dollars for cow feed, dried orange feed, per ton, we credit that against the cost of our fruit and reduce the cost of the fruit by that amount. And that credit towards that $33, which we would derive from the oil and the peel, was not included in that price.

Q. If you had considered the oil and peel credit, it would have reduced the 33 cents a gallon figure?

(Testimony of Wendell K. McCracken.)

A. I am glad to have a chance to correct it, yes.

Mr. Stark: I believe that is all. [800]

Redirect Examination

By Mr. Dixon:

Q. Just one question, Mr. McCracken.

The estimate of the selling price in Plaintiff's Exhibit 35 that counsel asked you about was, in fact, the price that TreeSweet expected to get for this product when they sold it, based upon the market and the selling price of the product at that time, was it not? A. That's right.

Mr. Dixon: That's all.

Mr. Stark: May I ask one further question?

The Court: Let me ask one question and maybe you won't have to ask yours.

The estimate that you referred to was an estimate of the 7 per cent and the 93 per cent, where you estimated—I am asking if this is true—where you estimated that 93 per cent of it would be sold—where was that, in California?

The Witness: Yes.

The Court: And 7 per cent would be outside of California. That was the estimate?

The Witness: Yes.

The Court: But there was no estimate as to the price that you would pay, was there?

The Witness: Your Honor, that is exactly right, I have no doubt we sold it at 55 and 60 cents per

(Testimony of Wendell K. McCracken.)

dozen. The estimate [801] was how much we sold in California and how much we sold in the eastern markets.

Knowing our treasurer, I am surprised he only estimated 7 per cent to be sold at the higher price.

The Court: I think it is the other way around, if you look. I think he estimated that the 93 per cent would be sold at the higher price. Maybe not.

The Witness: I got it the other way, your Honor.

The Court: "We estimate that only 7 per cent of this will be sold at 55 cents per dozen, and the balance of 93 per cent will go at 60 cents."

So he was estimating that you would sell the 93 per cent in California.

The Witness: That is my point. Knowing my treasurer, I am surprised that he estimated such a high amount for California, at the higher price.

The Court: All right, Mr. Stark.

Recross-Examination

By Mr. Stark:

Q. Mr. McCracken, in negotiating and executing the 1951 processing contract with Exchange Orange, did you have in mind any purposes or objectives other than those which motivated you to execute the 1950 contract or the 1949 contract? [802]

Mr. Dixon: I of course object to the question, your Honor. It calls for a conclusion of this witness, a statement of what was in his mind. That is for the jury to determine.

(Testimony of Wendell K. McCracken.)

The Court: Let me have the question read again.

(Question read by the reporter.)

The Court: The objection is overruled.

The Witness: No, sir, we did not. The objectives were the same in '51 as they were the prior years.

Mr. Stark: That is all.

Further Redirect Examination

By Mr. Dixon:

Q. If you hadn't had this contract, Mr. McCracken, you could not have produced, in fact, single-strength orange juice and sold it at your selling prices during the 1951 season, if you had bought the 23,000 tons from Sunkist at the selling price established by their price list; that is so, is it not? A. Yes, but——

Mr. Dixon: That is all.

Mr. Stark: Just one more. I think we will finish this exchange. [803]

Further Recross-Examination

By Mr. Stark:

Q. Mr. McCracken, you indicated that you pack your product for inventory, as well as for immediate sale, I believe? A. Yes, sir.

Q. In any given year, at the time you pack inventory of single-strength juice, do you know or can

(Testimony of Wendell K. McCracken.)

you tell whether or not you will make money or lose money on that particular inventory?

A. We have done both. You can do either one very successfully, lose or make. [804]

* * *

ROBERT VICTOR CLARK

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Robert Victor Clark.

Direct Examination

By Mr. Dixon:

Q. What is your residence address, Mr. Clark?

A. 221 Evelyn Drive, Anaheim, California.

Q. What is your business or occupation and your present business connection?

A. I am secretary-treasurer of the E. A. Silzle Corporation.

Q. How long have you been secretary and treasurer of that company? A. Five years.

Q. Who is the president of the company?

A. Thelma Silzle.

Q. Where is Mrs. Silzle at the present time, if you [805] know? A. She is in Florida.

* * *

Mr. Williams: I suggest we stipulate he has been unable to serve Mrs. Silzle on his statement, and we can move ahead.

(Testimony of Robert Victor Clark.)

The Court: Is that agreeable?

Mr. Dixon: That is agreeable.

The Court: Fine.

Q. (By Mr. Dixon): Mr. Clark, what products does your company make?

A. Single-strength orange juice, grapefruit juice, lemon juice, concentrates and citrus oils.

Q. Your company is primarily a processor, however, of single-strength orange juice, is it not?

A. Yes.

Q. And it was such in 1951?

A. It accounted for the bulk of our business.

Q. And the single-strength juice which you processed was sold in interstate commerce in the various states of the United States, was it?

A. It was.

Q. And that was true in 1950 as well as 1951?

A. Yes.

Q. You do make some other products you mentioned. Do you make any frozen concentrates?

A. Yes.

Q. Did you make any in 1951? [807]

A. No.

Q. When did you go into the frozen concentrate field? A. 1953.

Q. Now, are you familiar with the manner and method in which your company acquired Valencia oranges for processing purposes in 1951?

A. Yes.

Q. Did you handle any of the transactions which directly related to the acquisition of by-product

(Testimony of Robert Victor Clark.)

fruit for processing purposes by your plant in 1951? A. Yes.

Q. Well, did you do the buying of the fruit, the oranges, for example, that were processed by your plant in 1951 into single-strength juice?

A. No, I didn't actually do the buying.

Q. Who did the buying, if you know?

A. Well, in our company, I might explain we have a purchasing company that acquires the fruit and further sells it to us. The Bauer Fruit Company at that time, I believe, was instrumental in acquiring product fruit and selling it to us.

Q. I am not sure I get your answer. You mean you have a company within your company that buys fruit and sells it to your company?

A. It is not a part of our company. It is a separate [808] company.

Q. Does Silzle have any financial interest in the Bauer Company?

A. No, the corporation does not.

The Court: Is there some connection between this company and the Silzle Corporation?

The Witness: Yes. The Bauer Fruit Company is composed of Mr. Bauer and Bill Silzle, who is the son of Earl and Thelma Silzle, who are stockholders of the E. A. Silzle Company. It is a separate partnership operating company that acquires fruit. At that time it was functioning as such.

Q. (By Mr. Dixon): Do you have anything to do in performing the duties of your office at Silzle

(Testimony of Robert Victor Clark.)

in producing or processing the oranges into citrus juice products?

A. Yes. My job is secretary-treasurer, and I am also the general manager, so I administer the affairs of the company in all phases.

Q. Do you manage the processing operation of the Silzle company, as well as the other operations of the company of the kind you described?

A. Yes.

Q. So you are in charge of the processing part of the operations of the Silzle company, is that correct? A. Yes.

Q. From whom did the E. A. Silzle Company get the [809] oranges that it processed into citrus juice products in 1951, if you know? Let's start with the early part of 1951.

A. Valencia oranges or all citrus?

Q. Let's start with Valencia oranges, let's deal with them.

A. Well, we purchased Valencia oranges from either independent sources or direct from groves or from the Sunkist organization.

Q. Did you purchase any oranges, Valencia oranges, from Sunkist prior to June 12, 1951?

A. Yes, I believe so.

* * *

The Court: Well, I didn't understand you. I thought you told me Bauer Fruit Company bought fruit and sold to Silzle?

The Witness: That's right.

(Testimony of Robert Victor Clark.)

The Court: Now you say Silzle purchased oranges from Sunkist, independents, or growers.

The Witness: Well, I meant that the Bauer Fruit Company bought them for the account of Silzle.

The Court: So all the buying is done by Bauer Fruit Company, who in turn turn it over to Silzle Corporation?

The Witness: That's right. [810]

* * *

Q. (By Mr. Dixon): Mr. Clark, did you conduct any of the negotiations with anyone at Sunkist in 1951 in which any discussion was had with reference to the acquisition of oranges by Silzle to be processed into single-strength juice during the processing season in 1951?

A. I don't understand your question.

Mr. Dixon: Read it, please.

The Court: Read it, Mr. Reporter.

(Question read by the reporter.)

The Witness: I probably talked to the Sunkist member at the Citrus Distributing Plant, in talking about fruit to be purchased in 1951.

Q. (By Mr. Dixon): When were those discussions had, if you recall, Mr. Clark?

A. I don't recall.

Q. When did you start buying fruit from Sunkist in 1951, do you recall that?

A. I don't recall the exact date.

Q. About when? [811]

A. Possibly in March, April.

Q. Do you know under what arrangement, if

(Testimony of Robert Victor Clark.)

any, you acquired oranges from Sunkist at that time? By "you" I mean the Silzle Company.

A. Purchased on a tonnage basis.

Q. In other words, Silzle paid for them on delivery, did they? A. Yes.

Q. How long did that arrangement continue, if you know?

A. Up till June, if I remember correctly.

Q. About what time in June did the Silzle Company cease to buy oranges and pay for them on delivery in 1951?

A. I can't recall the exact date.

Q. About when, do you recall that?

A. It could have been the middle of June.

Q. Well, the arrangement was changed about the middle of June, was it?

A. As I recall, we ceased processing because it is more or less between seasons, between the northern Valencias and when the southern Valencias come into maturity for processing.

Q. And the northern Valencias are used primarily for what kind of product?

A. A blend of orange and grapefruit, and they are at [812] times processed into Valencia juice, single strength.

Q. And a concentrated orange juice, too, is it not?

A. Currently they will be that way, but not in 1951 we didn't concentrate them.

Q. You said that this arrangement or the man-

(Testimony of Robert Victor Clark.)

ner of acquiring oranges changed about the middle of June; is that correct? A. Yes.

Q. How did it change, insofar as the change came to your attention was concerned?

A. Well, that is the natural time for lack of processing. The southern Valencias are not in maturity at that time, so there will not be any production. We would just naturally stop producing during that period.

Q. I don't believe you quite answered my question. Maybe I didn't make it clear, Mr. Clark.

You continued to purchase Valencia—or acquire, let us put it that way—Valencia oranges from Sunkist throughout the balance of the processing season in 1951, after about the middle of June, did you not? A. Yes.

Q. Did you continue to pay for those oranges as they were delivered to Silzle by Sunkist——

A. No.

Q. ——during the balance of the season? [813]

A. No.

Q. When did any change in the manner of paying for or otherwise accounting for the oranges so acquired come to your attention?

A. It would have been in July some time that the manner of paying for the oranges was changed.

Q. Did you at any time, Mr. Clark, have any discussion with anyone at Sunkist about making any arrangement or changing the manner or method of acquiring oranges, different from that in which you

(Testimony of Robert Victor Clark.)

had been paying for them or acquiring them before that time?

A. I had no discussions with anyone.

Q. Who had those discussions, if you know, if anyone? A. Mrs. Silzle.

Q. Were you present at the time any of those discussions occurred between Sunkist and Mrs. Silzle? A. No.

Q. I take it, then, that you do not know of your own knowledge what the arrangement was, if any, that was made between Sunkist and Silzle Company, after you didn't pay for the oranges when they were delivered; is that true?

A. Only when the processing agreement was written up and furnished to us, then I became aware of it.

Q. When was that presented or when did that come to your attention? [814]

A. I don't recall the exact date.

The Court: You have been using the word "Sunkist"; I take it you are using that in a very broad sense to refer to Sunkist or their subsidiaries?

Mr. Dixon: That is right, your Honor.

Q. (By Mr. Dixon): I will hand you Exhibit 25, the same being a document which purports to deal with some arrangement between Silzle and Exchange Orange; will you please refer to that and indicate, if you can, when any change in the arrangement first came to your attention.

A. Well, July 15th—I signed this agreement as

(Testimony of Robert Victor Clark.)

secretary of the organization on September 10th. It was effective——

Q. When did you first see this agreement? You say you signed it on September 10th, Mr. Clark. When did you first see this agreement that you signed on September 10th?

A. Some date near September 10th. Probably several days prior to this time. I don't recall exactly.

Q. That was the first time that you saw that agreement that you executed on September 10th?

A. This is a supplemental agreement that you showed me here.

Q. Just read it if there is any question about it.

The Court: There is actually a letter, an agreement, and a supplement to the agreement, although it is one exhibit. [815]

The Witness: Yes, sir, September 10th is the date that it was signed.

Q. (By Mr. Dixon): You had, however, signed another document, a part of Plaintiff's Exhibit 25, on August 1, 1951? A. Yes.

Q. That is your signature, is it? A. Yes.

* * *

Q. (By Mr. Dixon): Will you state whether the document which you signed on August 1st—what does it deal with?

A. It deals with the processing of peel from other citrus plants for oil.

Q. Do you find anything contained therein deal-

(Testimony of Robert Victor Clark.)

ing with the acquisition by Silzle of any oranges under any arrangement with Exchange Orange?

A. No. [816]

Q. Do you recall how you happened to execute this document on August 1, 1951?

A. Only that I as secretary executed the agreements that apparently were discussed verbally between the EOP and Mrs. Silzle.

Q. Do you recall whether Mrs. Silzle said anything to you on August 1 when you signed that agreement about any arrangement between the Silzle Company and Sunkist or Exchange Orange?

A. Yes. I was aware of it.

Q. Well, would you answer my question, please?

Mr. Williams: Your Honor, wouldn't this be hearsay?

The Court: Read the question.

(Question read.)

The Court: The objection will be overruled because it calls for a yes or no answer. We don't get to the point yet of what she said.

Mr. Williams: I will raise it again when we get to the point, your Honor.

The Court: Did she say anything?

The Witness: Yes.

Q. (By Mr. Dixon: What, if anything, did Mrs. Silzle say to you on August 1 about any arrangement she had made on behalf of the Silzle Corporation to acquire oranges under any arrange-

(Testimony of Robert Victor Clark.)

ment for processing into single-strength orange juice [817] from Sunkist or Exchange Orange?

Mr. Williams: I raise my objection again, your Honor.

The Court: The objection is on the ground of hearsay?

Mr. Williams: Yes.

The Court: The conversation of August 1 prior to the contract of September 1, 1951?

Mr. Williams: I have forgotten the exact date of the conversation, but he is being asked to repeat what was told by somebody else, not what he knows himself.

The Court: It isn't as simple as you think it is, counsel. It involves this conspiracy question now.

Mr. Williams: Shall we approach the bench?

The Court: Well, let me think a minute about it. All right, you may approach the bench.

(The following proceedings were had at the bench outside the hearing of the jury.)

The Court: The amended complaint alleges that They are, as I said, named as a coconspirator, but dence an officer of the conspirator. Therefore, what she said or did may be material in one of two ways.

It may be material as to whether it is an admission by a conspirator, in which event, and obviously a corporation can only make admission through its officers, in which event the admission would bind only the conspirator involved, which would be Silzle. Silzle is not a defendant and there [818]

(Testimony of Robert Victor Clark.)

would be no particular purpose for the admission there.

If, on the other hand, the jury should find what was said and done was in fact preparatory to or part of the conspiracy, then it is admissible, and the hearsay objection is not good.

So it is a question for the jury to determine what it is.

Mr. Williams: Your Honor, I should explain my objection further. It is based on the ground no prima facie conspiracy has been shown. Once a prima facie conspiracy has been shown, then, of course, it is admissible against us, even though it is hearsay, as an admission of a coconspirator.

The Court: No admission would ever be admissible against anyone else. If it is only an admission, it isn't admissible against anyone except the person making it. If it is done in preparation of or part of the conspiracy, then it is admissible.

Mr. Williams: Unless there is some showing of a prima facie conspiracy, unless the evidence has shown a prima facie conspiracy, then our point is it is inadmissible at this time.

The Court: But counsel can only build the proof of conspiracy one stone at a time.

Mr. Dixon: May I suggest, your Honor, that under the usual procedure, based upon my experience in these matters, assuming something has been stated here, that the procedure followed is to permit the statement to go in subject to a motion to strike at the close of the case. Otherwise, as [819] your

(Testimony of Robert Victor Clark.)

Honor has indicated, it would never be possible to establish any conspiracy as a practical matter.

Mr. Williams: In this case, if the plaintiff——

Mr. Dixon: I think—may I finish my statement, counsel?

Mr. Williams: Excuse me.

Mr. Dixon: ——that the evidence already before the court, the contracts and the testimony of the witnesses, Mr. Kelly and Mr. Finley in connection therewith, certainly tends to show the connection of Silzle with the overall acts and combination charged by the plaintiff in the amended complaint.

The Court: It would only be admissible on the conspiracy count, wouldn't it?

Mr. Dixon: Yes, that's right.

The Court: Well, it has been my practice, Mr. Williams, in criminal cases involving conspiracy—I have only tried one or two civil ones—to admit evidence even though it is out of order subject to a motion to strike.

Mr. Williams: Of course, with a jury that is a different situation. If the jury weren't here, that would be the proper procedure.

The Court: Most criminal conspiracy cases are tried with a jury. That is also the practice of our chief judge and most judges in this district. So that will be the ruling of the court.

Mr. Williams: May I have a continuing objection to this [820] hearsay?

The Court: Yes, you may have a continuing objection.

(Testimony of Robert Victor Clark.)

Mr. Williams: Then I won't have to repeat it.

The Court: I think I should advise the jury in what respect only they may consider this.

Mr. Williams: Whatever you wish to do on that. We just wish to reserve the objection.

The Court: All right.

(The following proceedings were had in the hearing and presence of the jury:)

The Court: The objection is overruled, which means the witness is going to answer the question, but I want you to listen very carefully, because it is one of these situations where the matter may be admissible for one purpose and not for another. You have got to apply the law as the court gives it to you. Also, it involves a question of fact, and since facts are all for your determination, under one view of the facts, you will not consider this at all, but under another view you may consider it. I don't know what the answer will be. But assuming the witness says something besides, "I don't know or I don't remember," that will be the situation.

Here is what I am going to try to explain to you, how this is involved. The E. A. Silzle Corporation is alleged in the complaint to be a coconspirator. There is a conspiracy count in this complaint under Section 1 of the [821] Sherman Act, as you will recall.

Now, the law is that the things coconspirators do, if they are coconspirators, may be shown in certain

(Testimony of Robert Victor Clark.)

instances, what they do and say. There are two rules involved.

If a coconspirator makes an admission against his interest, that only binds the coconspirator that makes it.

Let me say in passing, since the E. A. Silzle Company is a corporation, it can only act through agents, officers. Therefore, if what Mrs. Silzle said was an admission against her interest, it would only be binding against the E. A. Silzle Corporation. They are, as I said, named as a coconspirator, but they are not defendants. So it would be an idle act to be concerned about any admissions that the E. A. Silzle Corporation might make against themselves, since they are not a party defendant. So we don't know. According to how you look at the facts, this may be considered by you to be an admission, in which event you won't be particularly concerned with it.

On the other hand, what conspirators do in the pursuit of the conspiracy after a conspiracy has been formed, what they do and what they say in the furtherance of the object of the conspiracy after it has been formed and before it is ended, binds every conspirator, so in that situation, if you take that view of the facts, what Mrs. Silzle as an agent or officer of the Silzle corporation may have said or done [822] may be very material to your consideration.

But, of course, that depends on these factual questions as to whether you find there was a con-

(Testimony of Robert Victor Clark.)

spiracy and whether this was in the pursuit of the conspiracy.

Now, let me see if I can give you two simple examples of the two rules. We have got two general rules that deal with the question of what alleged coconspirators said or did. One is the situation of the admission against interest, which binds only the alleged coconspirator who makes it. The other is the situation of the thing done or the act done or the thing said in furtherance of a conspiracy after it has been formed, which binds every coconspirator, if you find they are coconspirators.

So, now, then let's illustrate those two instances by a couple of simple examples. [823]

Let's take our men who were planning to injure this drug company. That example I gave you didn't deal with the law of evidence, it dealt with the question of how you are damaged by a civil conspiracy, so I will take another example, not to mix it up. A, B, and C conspire to rob a bank, and after they have entered into this conspiracy, which of course doesn't have to be entered into by express agreement or shaking of hands—in other words, it is entirely possible to find a conspiracy was formed by conduct and acts, you don't have to find express agreement—but after the conspiracy has been formed a policeman stops A and A says, "The jig is up, I am guilty, I did it, take me off to jail," those are admissions against interest, and when A, B, and C come to be tried, the evidentiary law of conspiracy is that it can only be shown against A,

(Testimony of Robert Victor Clark.)

the person who made those admissions, because obviously his admissions were not made in furtherance of the conspiracy.

Only acts done and things said in furtherance of the conspiracy bind everybody. And when he said, "You have got me, the jig is up, I am guilty," certainly that wasn't in furtherance of the conspiracy, so it binds only him.

On the other hand, A, B, and C conspire to rob this bank, A goes into a pawn shop and says, "Let me see what kind of a gun you have got here. Do you have a good gun cheap?"

The pawn broker says, "Yes, here is one I will sell you [824] for $10."

Well, later on investigators go around and they find out about his conversation with the pawn broker, it is then a question of fact for the jury to determine whether that act or the words he said were in furtherance of the conspiracy. And if the finders of fact, if the jury finds that those acts were in furtherance of the conspiracy, then they may use those acts or words against each of the persons that they find to be coconspirators.

Now, that is a simple example of the two situations. Now we have a question asked of Mr. Clark as to some conversation he had with Mrs. Silzle, the president of this corporation. I don't know what that answer is going to be. I am ruling that it is admissible to go into evidence under the conspiracy count of the indictment, Section 1 of the

(Testimony of Robert Victor Clark.)

Sherman Act count, on the charge that there has been a conspiracy.

You are the judges of the facts to determine that. And you must also determine as a matter of fact whether this was something done or something said in furtherance of a conspiracy, if such you ultimately find, or whether it was only some kind of an admission which would only bind the person and the organization making it.

Now, have you followed me on this explanation of the two situations that exist?

If you want to illustrate it in your own minds, you can [825] always think back to the simple example I gave you, which I think clearly demonstrates the difference between the two situations.

Is there any objection to the law as I have stated it or tried to state it in laymen's terms?

Mr. Williams: At one point your Honor referred to "this indictment." That no doubt stems from your extensive criminal experience.

The Court: There is no indictment here, ladies and gentlemen. This is a civil complaint for damages, and I stand corrected in that respect if that is what I said.

Mr. Williams: And one other thing. I would like to have more stress or something said about the fact that first they must find that a conspiracy exists before any of these statements are admissible.

That was implied, but wasn't brought out as fully as I think it should be.

(Testimony of Robert Victor Clark.)

The Court: Yes, it is a question of fact whether there was a conspiracy. It is a question of fact who were the parties to the conspiracy, if you find one to exist.

I have been catutioning you in my admonition not to discuss this case among yourselves. Why? So that you won't try to make up your minds in this case when you have only heard a part of the case. None of you should try to make up your minds in this case until you have heard all the evidence, all the [826] argument, and the instructions of the court. Then you will have to determine as a matter of fact if there was a conspiracy.

If there wasn't a conspiracy, that is the end of the count 1 charge. If there was a conspiracy, then you have to decide who were the parties to it. And those are questions of fact which you are the sole judges of.

Nothing that I have said is to infer that I have any view of these facts, that I think there is or there isn't any conspiracy, or any other situation here. That is up to you to decide.

And you will have to decide whether what was done was done under a conspiracy, if you find one to exist. And then you have a lot of other things to decide if you get that far along. Was there damage, and was there proximate cause, and that sort of thing.

Mr. Williams: That is satisfactory. Now, we can look forward to what Mr. Clark has to say. [827]

* * *

(Testimony of Robert Victor Clark.)

The Witness: I can't recall exact conversations that far back.

Q. (By Mr. Dixon): I know that is hard, but to the best of your recollection, if you can, will you tell the jury what she said, in substance, not the exact words, but the substance of what she said, if she said anything.

A. Well, basically, that we were to process Valencia oranges for the EOP into single-strength juice. And then as [828] this agreement bears out——

Q. No, I am just asking you now just what she said to you at that time, if anything, about getting oranges from Sunkist. That is my question, Mr. Clark. And if she didn't say anything that you remember, just say so. That is all we are trying to get.

A. I can't recall exact conversation. That would be my answer, then.

Q. I am not asking you, Mr. Clark, for the exact conversation. To the best of your recollection can you tell this jury the substance of what she said, not the exact conversation. I am not asking you for that. If you don't recall any conversations, that is the end of the question.

A. I don't recall any conversation that I can explain any further than I did.

Q. I didn't get any explanation or any answer to my question. I thought you said there was a conversation with Mrs. Silzle about the acquiring of oranges from Sunkist. A. That is correct.

Q. Now, my question, again, Mr. Clark, to tell

(Testimony of Robert Victor Clark.)

this jury to the best of your recollection the substance of what she told you at the time that this paper was signed on August 1st, which dealt with peel and orange oil, I believe, Plaintiff's Exhibit 25. [829]

A. Only that we had an agreement——

Q. By "we" you mean who?

A. That Mrs. Silzle and the Sunkist people had orally arranged to process this peel, and that we would receive a formal letter agreement. That would be about the extent of the conversation.

Q. Then the conversation dealt with the processing of peel, I take it; is that correct?

A. Well, which one are you referring to?

Q. You have it before you, Mr. Clark. It is the August 1st part of Plaintiff's Exhibit 25 that I am talking about.

A. That is in two parts, purchase of peel or processing of peel, and purchasing of single-strength juice.

The Court: Now, wait. This Exhibit 25 has various parts. The first two pages of it are a letter dated August 1, '51. Counsel's question may not have been too clear to you, but he is referring solely to the letter of August 1st, '51, which precedes a processing contract that comes later.

Q. (By Mr. Dixon): Now do you understand my question, Mr. Clark? I am talking only about what was said to you, if anything, by Mrs. Silzle at the time you signed this agreement on August 1, 1951, which is part of Plaintiff's Exhibit 25.

(Testimony of Robert Victor Clark.)

Do you understand that part of the [830] question? A. Yes.

The Court: All right. Now let's see if he can answer, and don't interrupt him.

Mr. Dixon: Thank you, your Honor.

The Witness: At the time this agreement was signed there was nothing discussed about any other program of acquiring fruit.

Q. (By Mr. Dixon): I thought that was the answer.

Then, so we are sure of it, the only thing that was discussed with you at the time you signed this agreement on August 1st, with Mrs. Silzle, was what related to the peel and the other things covered by that letter of August 1st; is that correct?

A. Yes.

Q. When was the first time that Mrs. Silzle informed you, if she did, of an arrangement between the Silzle Company and Exchange Orange for the acquiring of Valencia oranges by Silzle from Exchange Orange for processing into single-strength Valencia juice? A. Some time in July.

Q. Do you mean before this August 1st date that we have been talking about, at which time you signed this peel processing contract, that Mrs. Silzle didn't say anything to you about it, about any other arrangement for oranges?

A. Well, at that date, I can't recall. [831]

Q. If I understood your testimony, Mr. Clark, I thought you said that you had no conversation

(Testimony of Robert Victor Clark.)

with Mrs. Silzle, and she had none with you, at or prior to the time you signed this agreement which related to peel on August 1st, 1951. Am I right in that, or not?

A. We had daily conversations about our plant and the production of citrus juice. I can't recall all of the conversations.

Q. I presume you did, but I am asking you only, Mr. Clark, about any conversations Mrs. Silzle may have had with you about acquiring oranges for processing purposes into single-strength Valencia juice in 1951, and I am trying to determine whether you had such conversations.

Mr. Williams: We object to the argumentative form of the question. Apparently he is trying to impeach his own witness.

Mr. Dixon: Well, that is absurd, counsel, and you know it.

The Court: It is difficult to make all your questions simple, but let's see if you can make this question simpler.

Go ahead.

Q. (By Mr. Dixon): When was the first time that Mrs. Silzle spoke to you, if you recall, about any arrangement with Exchange Orange, other than the one that you signed on August 1, 1951? [832]

A. Some time in July. I don't recall the exact date.

Q. I wouldn't expect that you would.

The Court: Now, ask your next question.

(Testimony of Robert Victor Clark.)

Q. (By Mr. Dixon): Can you tell the jury about what part of July that conversation took place? A. No, I can't.

Q. Was it the middle of it, the end of it? Is there anything that fixes it in your mind at all, Mr. Clark?

A. Just that it was in July some time. That is about the only answer that I can give.

Q. All right. Now, state to the jury what she told you, if she told you anything, about any such arrangement.

A. That we would receive fruit for processing into single-strength juice from the EOP.

Q. And what was the occasion——

The Court: Wait a minute now. Have you finished?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Dixon): And what was the occasion, if you recall, for this conversation? Were you about to start processing, or what?

A. It was apparently the result of an oral conversation she had with the Sunkist people.

Q. Did she say anything to you other than the fact that there was an oral arrangement? [833]

A. I don't recall.

Q. So to the best of your recollection, all she told you was that there was an arrangement?

A. Yes.

Q. When was the first time that you were informed about the arrangement set forth in Plain-

(Testimony of Robert Victor Clark.)

tiff's Exhibit 25, which you signed as the secretary and treasurer of the Silzle Company on September 10, 1951?

The Court: That is the processing contract?

Mr. Dixon: Right.

Mr. Williams: There are two September 10's, the original and the supplement. Which one are you referring to?

Mr. Dixon: They were both signed at the same time.

Take the so-called purchasing agreement first.

The Witness: I don't recall the exact date that I would be aware of its entirety. Only that we had an agreement, oral agreement.

Q. (By Mr. Dixon): To the best of your recollection, was it about the time that you signed this agreement on September 10th?

A. Prior to that time, a few days prior to the receipt of this agreement, then I became aware of it in detail. Prior to that time it was just from oral conversations.

Q. Do you mean that you had had some oral conversations with Mrs. Silzle about the arrangement a short time prior to [834] September 10th, is that correct?

A. The oral conversations with her were prior to September 10th. [835]

Q. And about how much prior to it, can you tell the jury?

A. I don't recall how much prior time was involved.

(Testimony of Robert Victor Clark.)

Q. Well, was it a week or two weeks? Is there anything at all that you recall about the the time of those conversations?

A. No, I can't recall. [836]

* * *

Q. I believe when we adjourned yesterday, Mr. Clark, we were endeavoring to determine the basis under which the oranges were delivered to Silzle by Exchange Orange under this then oral arrangement in July, 1951, and I believe you indicated that you did not have any recollection at that time of the nature of that arrangement. You handled, as I understand it, the records of the Silzle Company concerning this transaction dealing with delivery of the oranges, insofar as the books of the company are concerned?

A. Yes, they are under my supervision.

Q. Can you state what entries, if any, were made on the books of the company with reference to any amounts that might be due to Sunkist or Exchange Orange for any oranges delivered to Silzle during the months of July and August of 1951? Do you understand my question?

A. It is of an accounting nature how the amounts——

Q. That's right. Were they held in suspense or did you set up an account payable as being due to Sunkist for the oranges, or just how was it handled on the books of the company?

A. I recall it was held in suspense and then entered as a journal entry sometime at a later date.

(Testimony of Robert Victor Clark.)

Q. That was approximately the time at which the [841] contract, Plaintiff's Exhibit 25——

Mr. Williams: Your Honor, I object to the question. It is his witness.

The Court: All right.

Mr. Dixon: I will withdraw it.

Q. (By Mr. Dixon): Can you tell the jury about when that entry was made?

A. No, I don't recall when that entry was made.

Q. Do you know or can you tell the jury about when any entry was made on the books of the company concerning these deliveries, or how long the item was held in suspense? Approximately? I know that you can't necessarily be specific as to the time.

A. Well, a journal entry in our books could be made as late as three months after the transaction was consummated. I don't know the exact date. [842]

Q. Now, Mr. Clark, will you tell the jury about how many tons of oranges were delivered to Silzle by Exchange Orange or Sunkist in 1951 that were not paid for in cash by Silzle to either Exchange Orange or Sunkist?

A. Approximately 6,000 tons, as I recall.

Q. Was that the tonnage of oranges that was handled under whatever arrangement it was, particularly that represented by Plaintiff's Exhibit 25?

A. Yes.